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NO. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KATHY JOHNSON,

Petitioner,

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

This case is about invited free speech and the right of association. It directly involves the constitutionality under the First Amendment of a regulation, adopted by a public university, which forbids students to associate with each other in their own dormitory rooms to discuss with their invited guests a variety of issues important to them. In particular, the regulation forbids "any person (including a student), firm, business entity, charitable organization or other organization," to speak to a group of students in a student's private dormitory room, to "solicit money or sell or solicit the sale of any product or service." (84a-85a).

The District Court found that the University permits students to congregate in a student's room to socialize and discuss anything except those matters specified above. The District Court also found that the invited communications prohibited by the challenged regulation pose no risks or burdens different from those associated with authorized forms of communication. (118a-119a). The Court fully accepted plaintiffs' testimony that the prohibited activities had important educational, social and cultural values, and concluded that the activities were entitled to First Amendment protection as pure free speech. Accordingly, the District Court invalidated the regulation.

The Court of Appeals reversed, concluding that the regulation was entitled to great deference because it merely prohibited "commercial speech." The Court also concluded that the regulation was "reasonably drawn" in light of the University's need to supervise student domitories.

The questions presented are as follows:

1. Does a regulation of a public university which prohibits students from gathering in an individual student's dormitory room to hear presentations from their own invited guests on a variety of subjects unconstitutionally deprive students of their rights of freedom of association and speech under the First and Fourteenth Amendments?

2. When a regulation prohibits voluntary communications among students in their own dormitory rooms concerning commercial, social, and educational opportunities and information, should such a regulation be accorded only minimal scrutiny under the commercial speech doctrine?

3. Even if the association and speech at issue are characterized as "commercial" in nature, can a university prohibit such speech and association in a student's own room when the prohibition is not needed to achieve the university's regulatory objective and less restrictive measures are more than sufficient to accomplish that objective?

PARTIES TO THE PROCEEDING

This petition is being filed on behalf of Kathy Johnson, a student at Penn State University. The remaining students in the proceedings below have graduated.

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THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully requests that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Third Circuit, entered on December 28, 1984, which reversed the decision of the United States District Court for the Middle District of Pennsylvania granting a permanent injunction and declaratory judgment in favor of petitioner.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix. (1a-43a) ("*AFS III*"). The opinions of the District Court for the Middle District of Pennsylvania are reported at 568 F. Supp. 666 (130a-151a) and 553 F. Supp. 1268. (72a-129a). Upon petition for rehearing before the panel and, alternatively, for rehearing in banc, the Court of Appeals issued an unreported order. (70a-71a).

The opinions of the Court of Appeals and District Court in earlier proceedings in this case are reported at 688 F.2d 907, 916 (44a-67a) and 522 F. Supp. 544. (152a-176a) ("*AFS II*").[1]

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1984. (68a). A timely petition for rehearing was denied on February 6, 1985. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT I

Congress shall make no law . . . abridging the freedom of speech . . .

AMENDMENT XIV. Section 1.

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

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[1] Earlier litigation between AFS and the University, not involving the students' rights, is reported at 464 F. Supp. 1252, *aff'd*, 618 F.2d 252 ("*AFS I*").

STATEMENT OF THE CASE

This is a students' rights case of invited speech and their right of association arising under the First and Fourteenth Amendments.[2]

The case arose as an action for declaratory and injunctive relief on behalf of students at Pennsylvania State University and also on behalf of a corporate plaintiff, American Future Systems, Inc. ("AFS").[3]

Originally, AFS challenged a regulation which had permitted AFS to come into common areas of the residence hall (lounges, meeting rooms, etc.) but which was applied so as to censor the content of the AFS demonstration.[4] The students' challenge, on the other hand, was to the University's ban on their right to host or participate in an AFS demonstration or other prohibited activities involving a group of students gathered together in an individual student's dormitory room. Thus, the case in its original posture was a dual challenge to the University regulations by both the students and AFS.

Less than two weeks before trial, the University amended its regulation to impose a total ban on use of the common rooms of the residence halls, as well as a continued ban of the use by the students of their own rooms or any other areas on the residence halls for any of the prohibited uses. After this

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[2] The jurisdiction of the Court of Appeals for the Third Circuit was pursuant to 28 U.S.C. § 1291. Jurisdiction of the United States District Court for the Middle District of Pennsylvania was predicated upon 28 U.S.C. § 1331 and § 1343.

[3] AFS is a corporation which at the invitation of a student and friends, demonstrates and sells household goods on college campuses throughout the United States. It was a stipulated fact at trial that the prohibition at issue concerned *invited* AFS demonstrations. (94a) (Finding of Fact No. 80). The District Court further found that AFS does not engage in door-to-door solicitations, (88a) (Finding of Fact No. 51), and this finding was not disturbed on appeal. (5a).

[4] The Court of Appeals in *AFS II* (44a-60a), sustained AFS's position regarding unconstitutional censorship of content and remanded the students' case for further hearing on the nature of their asserted First Amendment rights as well as the interest, if any, of the University to justify infringement.

change, AFS decided not to litigate its right to access to the common areas of the residence halls. The complaint and injunction papers were amended accordingly to withdraw AFS's direct claims.

The case went to trial solely on the issue of the students' First Amendment challenge to the regulation in the context of their individual and private right to free and unrestricted use of their dormitory rooms.[5] The instant case—dealing as it does with *invited*, as opposed to *uninvited* speech—poses a far different and more compelling First Amendment issue than that presented in *Chapman v. Thomas*, 743 F.2d 1056 (4th Cir. 1984) where the Fourth Circuit sustained a university's selective prohibition against door-to-door *uninvited* solicitations,[6] and where this Court, on April 1, 1985, declined to grant certiorari. 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 84-982).

1. The District Court Proceedings.

a. The Students' Position.

At trial, the students contended that the regulations impermissibly infringed upon their First and Fourteenth Amendment speech and associational rights. In particular, the regulation flatly bans important group communication in student dormitory rooms. It prohibits not only commercial communications, but also restricts other forms of free speech and political expression. The regulation expressly prohibits a group of students from inviting into their private dormitory rooms any person, including another student, any firm, any

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[5] This was specifically recognized by the District Court in its opinion:

> As a result of the narrowing of the issues in this litigation, the sole question before the Court is whether or not [the regulations] violate the constitutional rights of the *student* Plaintiffs.

(137a-138a) (emphasis by the Court).

[6] In *Chapman v. Thomas*, the Court noted that the university's solicitation policy did *not* "prohibit all solicitations" within residence halls. Unlike the facts in the instant case, solicitation there was permitted in the lobbies and waiting parlors of the dormitories and "[*u*]*pon express invitation, the appellant could also carry on his activities in the individual rooms of students.*" 743 F.2d at 1060 (emphasis added). Here, Penn State expressly forbids invited presentations in individual student rooms.

charitable organization, "or other organization" to speak to the students gathered in the room "to solicit money or sell or solicit the sale of any product or service." (84a-85a). Thus, for example, such activities as invited religious solicitations, political fund raising activities, Ethiopian aid drives, etc., in a group setting in a student's room, are forbidden.

The students at trial offered both lay and expert testimony, which was undisputed by the University and undisturbed by the Court of Appeals, to the effect that group discussion of such issues is essential to the information dissemination process and to the education and social and cultural broadening experiences of the participants. In addition, it was undisputed that the particular demonstration of AFS merchandise and services served educational, social and cultural values beyond merely communicating commercial information or offering products for sale. Four students and two experts so testified. The District Court fully credited the testimony and the students' sincerity.[7]

The prohibited activities in issue are quiet, peaceful and conform to all University regulations pertaining to health, safety, occupancy, etc. The University offered no evidence of any complaints, disturbances, or improper use (such as conducting a business out of a dorm room by repetitive use) of the dormitory rooms resulting from the activities prohibited by the regulation. Moreover, there was substantial evidence to the effect that the University allows students to otherwise gather in their rooms and discuss an almost unlimited range of issues of other kinds, to socialize, to play loud music, to participate in parties and to engage in numerous other loud, boisterous and disturbing activities in the residence halls which are limited only by the imagination of today's college student. (96a-97a).

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[7] The District Court stated: "[t]his Court has no doubt as to the sincerity of the student Plaintiffs in this litigation." (122a). Portions of the student testimony explaining their reasons for wanting to participate are quoted by the District Court at 141a-142a.

b. The University's Position.

The University offered only one fact witness to support its asserted justifications for its regulation, which the Court of Appeals distilled into two major asserted interests: 1) preserving the dormitories for their intended residential use, and 2) maintaining a quiet study atmosphere in the dormitories. (20a). The University, however, offered no evidence to support its contention that the challenged regulation was needed in order to achieve the asserted interests. In fact, it is clear, as found by the District Court, that the prohibited group demonstrations are quiet and non disruptive, in stark contrast to many of the disruptive activities permitted by the University in the residence halls. (118a).[8] Furthermore, preservation of the dormitories for their intended use is not inconsistent with the students' position in this case. Consistent with University policies the students all regard their rooms as their "homes away from home" [9] and they exercise broad control over the choice of invited guests and activities which occur in their rooms.

The District Court judge, after hearing three days of testimony, variously described the University's position and its proffered justifications for its ban as "unconvincing", "illogical", "absurd", "contrived", "not valid", and "grossly overbroad". (117a-119a).

Based upon the evidence adduced in this case and applying prior decisions of this Court, the District Court concluded that the regulation violated the constitutional rights of the students Graves and Johnson. (151a).

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[8] The only "evidence" offered by the University was the testimony of the Director of Residential Life Programs who postulated a number of concerns purportedly being served by the regulation. However, the District Court properly characterized these concerns as a "floodgate" argument and rejected them as "contrived" and "imagined". (119a). More pertinent to our contentions in this Petition, there was no evidence which attempted to tie these asserted but unproved concerns to the regulation as a mechanism to alleviate those concerns and to further the state interests. *See also* note 22 *infra* and accompanying text.

[9] *See* note 12, *infra* and accompanying text.

2. The Court of Appeals Proceedings.

A panel consisting of two Third Circuit Court of Appeals judges and one New Jersey District Court judge reversed and remanded with instructions to enter judgment on the merits for the University. Notwithstanding the pretrial amendment of the pleadings to eliminate AFS's direct claims, and the clear statement by the District Court of the issue presented, all three judges (particularly the concurring members of the panel), —and contrary to the record—treated this case, not as a students' rights case of *invited* speech, but from the perspective of a commercial seller of goods seeking First Amendment rights to gain *uninvited* access to and to speak in the Penn State dormitories.

a. The Majority Opinion.

The majority panel opinion concluded as a matter of law that the speech involved was solely commercial in nature and it applied this Court's opinion in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557 (1980) to uphold the regulation.

Tracking the four-part analysis of *Central Hudson,* the majority found:

> 1) the AFS demonstration is clearly lawful and not misleading. (20a);
>
> 2) the University's proffered interest in maintaining the dormitories for their intended use plus its proffered interest in maintaining a study atmosphere combine to equal a substantial justification for the regulation. (23a);
>
> 3) "it is not unreasonable to conclude that the character of the Penn State dormitories would be adversely affected in the absence of restrictions on commercial solicitation. The University's restriction, therefore, directly advances its purpose." (24a);
>
> 4) the University has chosen an "acceptable" alternative although a less restrictive alternative could have served to accomplish its proffered interests. (26a-27a).

b. The Concurring Opinions.

The concurring opinion by Circuit Judge Adams also concluded that only commercial speech was at issue and that the regulation satisfies the *Central Hudson* test. (29a-31a). In addition, Judge Adams would have upheld the regulation as a valid time, place and manner restriction or, alternatively, as a regulation somehow justified "in light of the special characteristics of the school environment" (quoting *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969)). (31a-36a). Finally, Judge Adams was of the view that the public forum cases provided separate support for upholding the regulation. (36a-38a).

District Judge Sarokin also concurred and wrote a separate opinion. Focusing entirely on AFS, his view was that AFS's activities were not entitled to threshold First Amendment protection. (39a-43a).

A petition for rehearing before the panel or, alternatively, before the Court in banc was denied with one judge voting to grant rehearing. (70a-71a).

REASONS FOR GRANTING THE WRIT

As the opening sentence of the Court of Appeals opinion recognizes, this case presents an important First Amendment question. (2a).

The regulation at issue directly affects thousands of students at Penn State and, as indicated by the five Amici briefs filed below,[10] concerns issues affecting many hundreds of thousands more students nationwide at public universities as well as all of the commercial, professional, political, charitable and other organizations that wish to communicate effectively in small groups with students who desire and who invite the

[10] The students were supported below by the following Amici in the Third Circuit: American Civil Liberties Foundation of Pennsylvania, United States Students Association, California State Students Association, Associated Students of Kansas, Commonwealth Association of Students and Student Association of the State University of New York, Inc.

communication into their dormitory rooms. Moreover, the regulation strikes at the heart of the privacy rights and intellectual freedom of college students. Under Pennsylvania law and the University's own policies, the student's own dormitory room is regarded as his or her "home away from home." (Point I.A.).

In addition to curtailing group commercial communications of value to students, the regulation sweeps far more broadly, preventing, for example, an invited religious organization from rallying support even in a dormitory room containing only members of that religious organization. Similarly, the young Republicans or young Democrats would be barred from meeting with a small group of their supporters in a dormitory room if the subject of financial support was to be covered during the political discussion.

The ultimate absurdity of the regulation is evidenced by the fact that all of the prohibited activities are permitted on a one-on-one basis. The regulation only prohibits *group* gatherings covered by its terms. Thus, a member of a religious organization or of the young Democrats or young Republicans is permitted to meet with one inviting student but not with two or more. Although a student may invite a commercial invitee to his or her dormitory room in a one-on-one setting, the student is prohibited from benefiting from the shared peer judgments of his or her dormmates or other friends. The students testified, and were reinforced by uncontested expert testimony, that group participation was important to them in making personal judgments and decisions regarding the communications in issue.

The regulation, therefore, cuts to the heart of the guarantees of free association, expression and choice—guarantees this Court has repeatedly held to be essential to the achievement of the goals of an educational institution. (Point I.B.).

The decision of the Court of Appeals is in conflict with past decisions of this Court. These decisions recognize that speech among students on social and educational matters is pure speech, requiring protection unless the government can estab-

lish a compelling need to regulate and unless the government has adopted the least drastic alternative. Here, the government used the most stringent alternative imaginable. (Point II).

Even under less stringent standards applicable to commercial speech or to time, place and manner controversies, the government must show that its regulation is not overbroad and is reasonably calculated to achieve an important objective. The Court of Appeals' ruling conflicts with this Court's decisions in this area since the Court of Appeals upheld a regulation which obstructs valuable communication in the face of undisputed evidence showing that the regulation does not serve to advance the University's interests (Point III. A.), and that all of the University's objectives could be satisfied by less draconian measures. (Point III. B.).

In view of the general importance of the issues to students at public universities, and in view of the conflict with past Supreme Court decisions, review of this case at this time is fully warranted.

I.

The Court of Appeals seriously erred in its treatment of this case as one involving the rights of a particular seller of commercial wares, rather than a case involving the rights of students to invite and participate in the activities prohibited by the regulation which was struck down by the District Court.

The issue in this case is not whether the University may constitutionally deprive a *particular seller* of access to the dormitory rooms by application of the regulation. Rather, the issue is whether and on what basis the University may deprive a *student* of the choice to invite and receive communications, commercial or otherwise, on a group basis in his or her dormitory room. That was the issue framed by the pleadings, tried to the District Court, and resolved there in favor of the students.

A.

First Amendment rights require special protection in the school environment. As this Court stated in *Healy v. James*, 408 U.S. 169, 180 (1972): "state colleges and universities are not enclaves immune from the sweep of the First Amendment . . . [q]uite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' " (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).[11] The Court of Appeals' opinion in this case severely undermines these First Amendment freedoms in an environment where they are needed the most. There are some 12,000 students on Penn State's campus who are directly affected by the Court of Appeals' ruling and many thousands more nationwide who are indirectly affected. These students are at a stage where they are growing, learning, testing, questioning and maturing. The proper environment to encourage such growth of this academic community of young people at Penn State and elsewhere is an open environment where communication, which is invited and desired, is allowed to flow freely.

The challenged regulation is a draconian impediment to the free flow of desired information—information which should form an integral part of the college student's educational and maturational process. This process certainly cannot be fulfilled solely in a classroom. As the District Court pointed out: "business and solicitation activities might well be just the sort of 'life training' which should take place in a dormitory." (118a-119a). The opportunity for this sort of "life training" is stifled by this regulation.

The infringement at issue here is particularly unsupportable in light of the particular environment where it occurs, *i.e.*, lawful, peaceful, non-disruptive activity in a students' private dormitory room.

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[11] More recently, the Court reaffirmed the principle that public school officials are subject to the dictates of the Constitution. *See New Jersey v. T.L.O.*, 105 S.Ct. 733 (1985) (holding public school officials are representatives of the State subject to Fourth Amendment's strictures).

Under Pennsylvania law, and as recognized by the court below,[12] a student dormitory is "essentially equivalent to the interior of a private home." *Brush v. Pennsylvania State University*, 489 Pa. 243, 249, 414 A.2d 48, 51 (1980). Hence, there is a special reason to be as protective of the rights of students to discuss, learn and associate in this context as would be the right of adults to do so within the privacy of their own homes. This is the antithesis of a public roadway, sidewalk, common study lounge or other region where the students must curtail their own expressive conduct in the interests of free traffic flow, public safety, etc.

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Stanley v. Georgia, 394 U.S. 557, 565 (1969).[13] The fundamental right enunciated in *Stanley v. Georgia* is stripped away from

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[12] *AFS III*, 123a *citing Piazzola v. Watkins*, 442 F.2d 284, 289-90 (5th Cir. 1971) and *AFS I*, 464 F.Supp. 1252, 1262 (M.D. Pa. 1979), *aff'd*, 618 F.2d 252 (3d Cir. 1980).

[13] The First Amendment also means that the State has no business telling a person sitting alone in his house what guests he or she may entertain or the subjects they may discuss. This Court has recognized that associational rights include the right to entertain invited guests in one's home. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court, while discussing the validity of a zoning ordinance, stated that:

> The ordinance places no ban on other forms of association, for a "family" may, so far as the ordinance is concerned, entertain whomever it likes.

416 U.S. at 9.

The occupant of a private apartment should be accorded full First Amendment protections to expressive conduct occurring in that apartment notwithstanding the fact that the apartment is a dormitory room and the government in the form of a state university happens to be the landlord. *Cf. Franceschina v. Morgan*, 346 F. Supp. 833 (S.D. Ind. 1972) (residents of migrant camps have First Amendment right to meet with invited guests in their dwellings unrestricted by the views of the landlord as to what speech is appropriate).

college students in their own dorm room homes by the regulation at issue.

This Court reaffirmed in *Plyler v. Doe,* 457 U.S. 202, *reh. denied,* 458 U.S. 1131 (1982), the principles that the "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance;" 457 U.S. at 221 (quoting *Meyer v. Nebraska,* 262 U.S. 390, 400 (1923)), and that the "historic 'perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.'" *Id.,* (quoting *Ambach v. Norwick,* 441 U.S. 68, 77 (1979)). Most recently, the Court stated: "Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry." *New Jersey v. T.L.O.,* 105 S.Ct. at 760-61 (Stevens, J., concurring in part and dissenting in part) (footnote omitted). The Penn State regulation is antithetical to these notions. Not only does it prevent the acquisition of knowledge and the potential for free discourse of fundamental, political or social values, but it does so in the context of a student's private room on a major university campus.[14]

For these reasons alone, certiorari should be granted to review the Court of Appeals' disregard and apparent misperception of the crucially important and fundamental First Amendment values at issue in this case.

B.

The regulation also infringes on the students' First Amendment right of association. The regulation in this case prevents

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[14] As this Court noted in *Schneider v. State,* 308 U.S. 147, 163 (1939), "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *See also Healy v. James,* 408 U.S. at 182-83, where this Court rejected the University's argument that because the prohibited student activity could take place off campus that there was no abridgment of constitutional rights: "[T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [University's] action. We are not free to disregard the practical realities."

far more than a Tupperware-type party among a group of students in their home away from home. By its express terms, it is not limited to business or commercial entities. It prevents the solicitation of money or the sale or solicitation of the sale of any product or service to a group of students in a dormitory room by *another student, charitable organization, religious organization or "other organization".* (emphasis added). Thus, under the regulation, one student would be prevented from tutoring a group of students in a dormitory room because this is a prohibited sale of a service. An Ethiopian fund-raising gathering in a student's room or political or religious discourse which includes solicitation of money are similarly prohibited. This is a clear and drastic infringement on the students' associational rights.

The First Amendment right of association has been recognized repeatedly by this Court. *See, e.g., Smith v. Arkansas State Highway Employees,* 441 U.S. 463, 464 (1979); *Healy v. James,* 408 U.S. at 181; *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). Moreover, the right of association protects lawful gatherings of all sorts, whether initiated for social, economic, religious or political reasons and whether the association is formal or informal. Thus, just as members of the public have the right to assemble on the sidewalk,[15] and prisoners have associational rights to receive visitors,[16] the students at Penn State possess the First Amendment right peacefully to gather in their dormitory rooms to learn about and have the opportunity to contribute to a political cause, listen to an invited educational and commercial demonstration, or place orders to purchase china, Christmas cards, insurance, stocks, or whatever they so desire.

This right to freely associate is entitled to substantial protection. In *NAACP v. Alabama,* this Court recognized that "it is immaterial whether the beliefs sought to be advanced by

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[15] *Cf. Coates v. City of Cincinnati,* 402 U.S. 611 (1971) (loitering statute which made it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passersby struck down); *Sawyer v. Sandstrom,* 615 F.2d 311, 315-136 (5th Cir. 1980) (same; court specifically recognized that the " 'protected freedom' involved . . . is the first amendment guarantee of freedom of association").

[16] *Feely v. Sampson,* 570 F.2d 364, 372 (1st Cir. 1978) ("Visitation rights . . . reflect . . . most clearly the right of association").

association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the *closest* scrutiny." 357 U.S. at 460-61 (emphasis added). In this case, by contrast, the University's prohibition of associational rights received virtually no scrutiny from the Court of Appeals.

II.

The Court of Appeals erred in its conclusion that the speech rights at issue in this case are solely commercial.

The communication and interchange of ideas prohibited by the regulation involve much more than commercial speech. Commercial speech is "speech which does 'no more than propose a commercial transaction' ". *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385, *reh. denied*, 414 U.S. 881 (1973)). The communicative process at issue here goes far beyond merely proposing a commercial transaction. There was no dispute that the prohibited invited communications of the business invitee involved definite educational, social and cultural benefits. (12a-13a; 16a; 89a-90a; 141a-142a). The District Court described the presentations as "just the sort of 'life training' which should take place in a dormitory." (118a-119a). This finding, which the University did not challenge on appeal, and which was undisturbed by the Court of Appeals, was overwhelmingly supported by two eminent experts from two of Pennsylvania's leading educational institutions [17] who testified in the students' case.

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[17] Dr. Krafft is a professor at Temple University in the Department of Psycho-Educational Processes and his field of expertise is concentrated in the area of group dynamics and inter-personal behavior.

Dr. Morris, a legal scholar, is professor of Political Science at the University of Pennsylvania who lives on campus with students in a residence hall and who witnessed an AFS demonstration in person in his own residence hall. Dr. Morris was also qualified as an expert on student life based in part upon having served for two years as assistant to the Provost at Columbia University where the quality of student life was one of his special concerns.

Moreover, by focusing on the case solely from the perspective of an AFS demonstration, the Court of Appeals failed to come to grips with the fact, as stressed above, that the regulation is not limited in its application to AFS presentations, but also infringes upon forms of non-commercial discourse and pure free speech described in Part I.B., *supra*. Thus, the Court of Appeals' reliance on *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983) to conclude that only commercial speech is at issue was erroneous.

The *Bolger* case involved unsolicited (*i.e., uninvited*) mailings of literature to the general public, whereas this case involves the rights of students to *invite* business [18] and non-business entities into the privacy of their dormitory rooms for the purpose of hosting and/or participating in group discussions which constitute an exercise of non-commercial free speech and associational rights. In addition, most of the unsolicited mailings in *Bolger* were purely commercial in nature. 103 S.Ct. at 2880 & n.12. In contrast, the students, as the *recipients* of speech and *originators* of this action, have stated, and the District Court found, that their reasons for desiring to participate in the prohibited activities in this case were not commercial, but were primarily social, educational and cultural.[19] This was not disputed or disturbed on appeal.

Finally, this Court's *Bolger* opinion focuses upon uninvited speech, concerning First Amendment rights of a drug company to mail literature, and not upon the rights of the public to

[18] This case does not involve, for example, the commercial speech rights of commercial sellers to gain *un*invited access, in order to peddle goods. *Cf. Breard v. City of Alexandria*, 341 U.S. 622 (1951) (distinguishing between *in*vited and *un*invited speech in upholding ordinance which banned uninvited door-to-door peddlers in residential area). *Cf.* note 6, *supra*, and accompanying text (similar distinction made in *Chapman v. Thomas*).

[19] Thus petitioner submits that one participant in an interchange of communication protected by the First Amendment (*i.e.*, the students), may have a different and higher level of constitutional protection accorded to their participation in the communicative process than does the other participant as a speaker (*i.e.*, the commercial invitee). *Cf. Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972) (recognizing the existence of the listener-inviters' First Amendment rights where the speaker-invitee had none).

receive it. Thus, the Court of Appeals erred in analyzing the rights at issue here from the perspective of the commercial invitees' right to come on campus, rather than analyzing the rights of the students themselves, which is the proper focus presented by this case. *Bolger* is a commercial speech case only and the Court of Appeals' reliance upon it was misplaced.

The University's attempted reliance upon *Central Hudson* to argue that the prohibited speech is solely commercial was properly rejected by the District Court:

> The reliance of the Defendants on *Central Hudson Gas* is misplaced. As recognized by this Court in *American Future Systems III*, the issue is not whether the precise presentation of AFS may or may not be permitted in Penn State's residence halls. Instead, the issue is whether Penn State's Dormitory Solicitation Regulations may be enforced to prevent *students* from exercising their First Amendment speech and associational rights.

(140a).

The fact that some of the prohibited conduct may have commercial attributes is not sufficient for it to be labeled as purely "commercial speech." The Court of Appeals' opinion conflicts with its own decision in *AD World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1140 (3d Cir.), *cert. denied*, 456 U.S. 975 (1982), where it stated that the "category of 'commercial speech' " is limited to " 'purely commercial advertising' ".[20]

Because pure free speech is being infringed in this case, the Court of Appeals was wrong in its belief that it had only minimal responsibility to determine whether the regulation was overbroad and unnecessary. Pure speech is entitled to the

[20] The amicus briefs filed below supported petitioner's view that more than an infringement upon commercial speech is at stake. *See e.g., Brief of Amicus Curiae American Civil Liberties Foundation of Pennsylvania* at 11 n. 1 (189a).

highest threshold of protection unless the state establishes a compelling state interest and uses a narrow form of regulation. *In Re Primus,* 436 U.S. 412, 432 (1978). As we point out in Section III, *infra,* the broad-brush approach of the University in this case is quite the opposite of a narrow form of regulation.

The Court of Appeals' utilization of a minimal level of scrutiny is also in conflict with the latest decisions of this Court which establish that even symbolic conduct, entitled to the least protection under the First Amendment, is nevertheless entitled to a careful judicial assessment of the necessity of the means selected to restrict such conduct. *See United States v. Grace,* 461 U.S. 171 (1983) (prohibition on carrying banner on Supreme Court sidewalk struck down because total ban did not serve purpose of maintaining order and preventing interference with influencing judicial decisions).

Because of the direct and drastic infringement on the pure free speech rights of students, and the failure of the Court of Appeals to properly assess those rights and adequately measure them while sufficiently scrutinizing the University's justifications, review by this Court is both necessary and appropriate at this time.

III.

Assuming arguendo that some of the speech and association at issue are characterized as commercial in nature, the regulation in this case still falls far short of satisfying this Court's commercial speech standards.

There is no dispute that the speech at issue is neither unlawful, nor false and deceptive. (20a). The speech and associational activity is therefore entitled to constitutional protection. To pass constitutional muster, a restriction on such speech must satisfy three requirements: (1) it must be justified by a substantial state interest, (2) it must directly advance that state interest and (3) it must be no more extensive than is necessary to serve that interest. *Central Hudson,* 447 U.S. at 564-66.

The instant petition is limited to the second and third requirements of *Central Hudson, supra*: that the regulation fails to advance the proffered state interests and that it is far more extensive than necessary.[21]

A.

The Court of Appeals' remanded the students' rights issue in the *AFS II* case because the record evidence failed to support the University's claimed justifications for the infringement of the students' rights to the use of their individual dormitory rooms:

> The difficulty is that on this record we do not know whether there is a blanket prohibition against all organized group activity [in a student's room], and there have been no findings made by the district court as to the basis for such a prohibition.
>
> * * *
>
> In this case the absence of any record [on the issue of whether the regulation serves a significant state interest] and any findings by the district court makes this an inappropriate case for summary judgment. The University's reliance on the need to preserve a study atmosphere, asserted also in defense of this regulation, is unsupported by any evidence in this record. . . .

(57a-58a). Thus, the case was remanded to the District Court and a three day evidentiary hearing was held which, by stipulation of the parties, became the trial on the merits. *See* Fed.R.Civ.P. 65 (a)(2).

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[21] However, petitioner believes and has asserted in the courts below that the regulation fails to satisfy all three of the above requirements and petitioner wishes to preserve these issues should the Court decide to review this case.

At trial, the University utterly failed to prove that its asserted interests (*i.e.*, the "floodgate" argument) were furthered by the regulation. After hearing the evidence, the District Court found:

> *First,* Penn State expresses concern over the invasion of students' privacy rights. Because these privacy rights are individual rights of the students, it is absurd to think that these rights could not be waived by the student.
>
> *Second,* with respect to disruption of students while studying or sleeping, there appear to be many "permitted" activities in the dormitories which are substantially more disruptive.
>
> *Furthermore, there is no evidence that AFS or any other commercial organization would refuse to comply with reasonably drafted regulations to prevent such disruption.* With respect to the concern of Penn State that group solicitations could disrupt the educational and personal development programs in the dormitories, *no such potential for disruption has been demonstrated.*
>
> * * *
>
> The Court is unable to envision a situation where group solicitation activities of the sort contemplated by AFS would disrupt student government or either organized or informal social and recreational activities. Penn State is concerned that the *imagined disruptions* are inconsistent with the purposes to which residence halls are dedicated and that greater frequency of solicitation activities would lead to such disruptions. *This "floodgate" argument is not persuasive in light of the evidence.*
>
> * * *
>
> As drafted, Penn State's regulations do not address the anticipated problems. Significantly, *Penn State's*

> *present regulations are not reasonably drafted to prohibit disruptive activities but, instead, presume disruption will result.* Because there is no practical distinction between one-on-one solicitations and group solicitations in terms of safety, security, and other purported state interests, a wholesale preclusion of group solicitations is probably grossly overbroad.

(118a-120a) (emphasis and paragraphing added).

Thus, while the University claimed a potential for disruption, it did not prove disruption would occur or had occurred, nor did it even prove that disruption would potentially occur absent the regulation. The record was absolutely barren of any evidence which would support a nexus between the claimed state interests and this regulation as a necessary furtherance of those interests.

Despite the above, the panel in this case found that the regulation advanced the asserted state interests with a cursory analysis which concludes with the following unproved speculation:

> it is not unreasonable *to conclude* that the character of the Penn State dormitories would be adversely affected in the absence of *restrictions* on commercial solicitation. The university's restriction, *therefore,* directly advances its purpose.

(24a) (footnote omitted) (emphasis added).[22]

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[22] The only evidence of any kind relied upon by the Court of Appeals to support this conclusion was the finding that in 1977, 51 demonstrations had been scheduled by AFS in a two-week period. (24a n.30). From this fact the Third Circuit presumed, without a shred of evidentiary support, that "disruption from this activity is apparent."

This finding is not only speculative but also illogical. Fifty-one demonstrations over that two-week period scheduled almost eight years ago equates to an average of 3.6 demonstrations per day involving a total of approximately 36 to 54 students. There are over 12,000 students in 40 residence halls containing 6900 rooms on campus at Penn State. (80a). Thus, those 51 demonstrations in that two-week period in 1977 affected .25% of the students in residence halls.

The crucial point, however, is that the demonstrations of AFS merchandise are undisputedly quiet and peaceful and that they occur by invitation

(footnote continues)

In so holding, the panel opinion squarely conflicts with prior opinions of this Court and, in particular, distorts the meaning of the second requirement of *Central Hudson, supra.*

The panel opinion also has rendered virtually meaningless the fact finder's function. The record evidence offered no better support for the prohibition of activity in the students' rooms in this case than it did in *AFS II,* where the Court of Appeals remanded the matter for development of record evidence. Moreover, there is no mention by the panel of the standard of review applicable pursuant to Fed.R.Civ.P. 52(a) and likewise no finding by the panel that the District Court's findings were in any way incorrect, let alone clearly erroneous.[23]

The *Central Hudson* test requires more than an assumption or speculation that the regulation advances the governmental interest. This Court's First Amendment decisions, both before and after *Central Hudson,* have repeatedly recognized the need for record evidence in addressing the issue of a nexus between the governmental regulation and the claimed justification. For example, as this Court pointed out in *Tinker,* the District Court there committed the same error made by the panel in this case:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the

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(footnote continued)

only. Also, unlike the typical "Tupperware party" occurring in a social setting in the inviter-host's home, the student invitee at an AFS demonstration is free to get up and leave at any time to return to his room next door or down the hall to resume studying, watch television, join a "keg party," etc.

[23] The Third Circuit's opinion therefore conflicts with this Court's recent decision in *Anderson v. City of Bessemer,* 53 U.S.L.W. 4314 (U.S. March 19, 1985) (No. 83-1623) where the Court states that "review of factual findings under the clearly erroneous standard—with its deference to the trier of fact—is the rule, not the exception." *Id.* at 4317.

> majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disburbance. But our Constitution says we must take this risk, *Terminiello v. Chicago,* 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly *where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. Burnside v. Byars, supra,* at 749.

393 U.S. at 508-09 (emphasis added). To the same effect, *see Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 95-96 (1977) and *Schad v. Mount Ephraim,* 452 U.S. 61, 72 (1981).[24]

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[24] In *Linmark,* this Court again noted the lack of record evidence to establish that the challenged ordinance advanced the township's objective. Likewise in *Schad,* the Court pointed out that the Borough failed to introduce evidence to support its assertion that the restriction at issue was necessary in order to preserve the Borough's desired plan for the commercial area involved. 452 U.S. at 72. The Court further noted that the Borough presented no evidence to support its assertion that the live entertainment at issue posed problems different than those associated with the permitted uses of the commercial district in that case. *Id.* at 73. *Cf. Cinevision Corp. v. City of Burbank,* 745 F.2d 560, 572-73 (9th Cir. 1984), *cert. denied,* 53 U.S.L.W. 3757 (U.S. April 22, 1985) (No. 84-1389) (relying upon *Tinker* for principle that apprehension of potential disturbance not enough to justify infringement).

In similar fashion, even accepting *arguendo* that the state's underlying interests in this case are substantial, th re has been no demonstrated link between those interests and the challenged regulation. To the contrary, Penn State allows the otherwise prohibited group activity if it is done on a one-on-one basis and as the District Court properly found: "[t]here is no practical distinction between the one-on-one presentation as opposed to the group presentation in terms of safety, security and other purported state interests." (120a).

B.

Finally, the Court of Appeal's decision squarely contradicts this Court's clear holding with regard to the final prong of the *Central Hudson* test. The panel erroneously read this aspect of *Central Hudson* as permitting a restriction to stand even if a less intrusive restriction would serve to accomplish the state's objective. The panel specifically stated:

> [A]lthough we might be able to imagine alternative regulations that accomplish Penn State's objectives while interfering less with the students' and AFS's rights to communicate, we will not strike down the university's regulation on this ground.

(26a).

A comparison of the above statement by the panel with this Court's clear admonition in *Central Hudson* that "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive," 447 U.S. at 564, leads inexorably to the conclusion that the Court of Appeals' opinion is completely wrong as a matter of First Amendment law.

In *Central Hudson,* this Court described the question of the "no more extensive than necessary" criterion as the "critical inquiry" in that case. 447 U.S. at 569-70. Invalidating the suppression of advertising at issue in *Central Hudson,* the Court pointed out that "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests" and that "[i]n the absence of a showing that more limited speech regulation

would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising." *Id.* at 570-71 (footnote omitted).

Similarly, in *Schad,* the court acknowledged that certain forms of live entertainment potentially could create problems not associated with the commercial activity permitted by the Borough, but that the Borough's ordinance was not narrowly drawn to respond to those potentially distinctive problems and that it was "not clear that a more selective approach would fail to address those unique problems if any there are." 452 U.S. at 74. The Borough of Mount Ephraim, like the state university here, "has not established that its interests could not be met by restrictions that are less intrusive on protected forms of expression." *Id.*

The governmental interests asserted in this case, even if shown to be substantial and directly advanced by the regulation, could be served by a far less drastic restriction than the total ban which the University has imposed. For example, the roommate's consent could be required, or reasonable limitations on the hours of the day, noise levels, or frequency of occurrence, etc. might be imposed where third-party invitees were involved. Similarly, regulations which required invitees to sign in at the residence hall and to be escorted to and from the inviter-student's room might likewise be imposed should they prove to be needed. Instead, the University flatly prohibits the activities described in Part II, *supra.* Because the proffered state interests could be so clearly served by less drastic means, the regulation fails to meet this Court's fourth prong of the *Central Hudson* test.

This Court should grant certiorari to prevent the Third Circuit's erroneous interpretation of the commercial speech standards of *Central Hudson* from depriving petitioner, and other students affected by the restriction, of significant First Amendment speech and associational rights.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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May 2, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-3412

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOHN D. VARSICS, DENNIS C. HABACHER, JOHN B. SPILLER, KATHY JOHNSON, KEVIN GRAVES,

Appellees

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Appellants

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C. Civ. No. 81-0171)

Argued April 23, 1984

Before: ADAMS and BECKER, *Circuit Judges*, and SAROKIN, *District Judge**

(Filed December 28,1984)

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* Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal presents an important first amendment question concerning the power of a state university to regulate activities in student dormitories that it operates in conjunction with its educational programs. Specifically, we are confronted with a challenge to the constitutionality of a regulation

enacted by Pennsylvania State University ("Penn State") prohibiting group sales demonstrations in students' dormitory rooms. The regulation has operated in this case, now before us for the third time,[1] to bar several Penn State students from attending or hosting sales demonstrations conducted by American Future Systems ("AFS"), a corporation that conducts such sales demonstrations as a means of marketing its china and cookware. After trial, the district court held that the regulation was unconstitutional and entered an order enjoining Penn State from continuing to ban AFS sales demonstrations in the dormitories. For the reasons set forth below, we hold that the regulation does not unconstitutionally infringe upon either the right of students to receive commercial information in association with other students or upon the right of AFS to disseminate such commercial information. Accordingly, we reverse the judgment of the district court.

I. *FACTS AND PROCEDURAL HISTORY*

The plaintiffs-appellees in this action are AFS and a number of Penn State students.[2] AFS is in the

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1. *See* American Future Sys., Inc. v. Pennsylvania State Univ., 618 F.2d 252 (3d Cir. 1980) ("*AFS I*"); and American Future Sys., Inc. v. Pennsylvania State Univ., 688 F.2d 907 (3d Cir. 1982) ("*AFS II*"). The district court has also authored several opinions in the case, which, after the initial reference, we refer to by their volume of the Federal Supplement, preceded by the legend "AFS."

2. As explained below, this case was originally brought by AFS alone; the students were joined after this court affirmed the district court's holding that AFS could not assert the constitutional rights of its potential customers. *See* American Future Sys., Inc. v. Pennsylvania State Univ., 464 F. Supp. 1252, 1259 (M.D. Pa. 1979), *aff'd*, 618 F.2d 252 (3d Cir. 1980) (*AFS I*). The student-plaintiffs named in the

business of selling cookware, china, crystal, and silverware, primarily to college students.[3] Its primary sales device is the on-campus demonstration, which is similar to the well-known Tupperware party. An AFS representative meets with a group of students in their dormitory, gives a presentation extolling the virtues of AFS's merchandise, and attempts to make sales at the end of the presentation. The students are encouraged to sign an installment sales contract at the time they agree to make the purchase.

AFS actively recruits students to host its demonstrations. An AFS sales representative contacts a particular college student, usually a woman, and asks if she will host an on-campus demonstration.[4] The student is informed during the initial phone conversation that, if she hosts an AFS demonstration, she will receive a free vacation in Florida or Las Vegas.[5]

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amended complaint are Steven Brubaker, Richard J. Wingert, W. Bruce Del Valle, Joan D. Varsies, Dennis C. Habacher, and John B. Spillar. Kevin Graves was added as a plaintiff in August 1981; Kathy Johnson was added in December 1982; and John B. Spillar was dropped as a plaintiff at the same time. Only Graves is currently a student at Penn State.

3. AFS's sales techniques are described in detail in United States v. American Future Systems, Inc., 571 F. Supp. 551, 554-57 (E.D. Pa. 1983), *aff'd*, No. 83-1766 (3d Cir. Sept. 5, 1984).

4. The original contact is made either by AFS's central booking office in Bryn Mawr, Pennsylvania, or by the sales representative responsible for the area in which a particular college is located.

5. The "free vacation" does not include food or transportation, but only accommodations. American Future Sys. Inc. v. Pennsylvania State Univ., 553 F. Supp. 1268, 1273 (M.D. Pa. 1983) (finding of fact No. 55). There are evidently other limitations on the offer as well. It may not be used unless the recipient is 21 years of age or older and may only be used

If a student agrees to host a demonstration, she receives a packet of information containing a number of invitations for guests, which she is asked to distribute to other students, and a description of what is involved in the show.

AFS seeks to have about ten to fifteen female students at each demonstration.[6] This "target" size is evidently based on AFS's experience that ten to twenty percent of the students at a particular demonstration usually agree to purchase AFS products. If fewer than the optimal number of students are present five minutes before the demonstration is scheduled to begin, the AFS representative asks those in attendance to attempt to round up others. The representative informs them that there will be a "door prize" of a trip to Florida if at least ten women are present,[7] and tells them that a donation will be made to "Save the Children" for each person at the show. The AFS representative does not solicit attendance by knocking on doors herself unless permission to do so has been granted by college officials.

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within a prescribed time period. The effect of these two limitations is that many students do not use the "free" vacation at all. *See AFS*, 464 F. Supp. at 1256 (finding of fact No. 35). AFS generally does not inform the potential hostess of these limitations. *See AFS*, 553 F. Supp. at 1274 (finding of fact No. 77); *AFS*, 464 F. Supp. at 1256 (findings of fact Nos. 27, 35). *But see AFS*, 464 F. Supp. at 1256 (finding of fact No. 26).

6. This number does not include women who have attended AFS demonstrations before. *AFS*, 553 F. Supp. at 1273 (finding of fact No. 58).

7. This Florida trip is subject to the same limitations as that offered to the hostess. Only women who have not previously attended an AFS demonstration are counted toward the ten required for the offering of a door prize. *See supra* notes 4 & 5.

Once the students are present, the AFS representative conducts the demonstration, which is set in the context of a discussion of the post-college lifestyle of students. The AFS representative demonstrates the "American Prestige Series" products, compares them with similar merchandise, and explains the advantages of AFS's wares.[8] Following the demonstration, the representative asks whether any of the students are interested in purchasing the products, and attempts to get those students to sign purchase agreements at the meeting. If a student agrees to buy, the representative fills out a contract that contains a code describing the student's educational institution, race or national origin, marital status, and type of residence. AFS uses this information to determine the credit terms to be extended to the student.[9]

When AFS first sought to conduct its demonstrations in Penn State's dormitories in the fall of 1977, the demonstrations were prohibited by the university's general policy against commercial solicitation.[10] Nonetheless, Edward M. Satell, president

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8. The demonstrations are extensively scripted and accompanied by visual aids. The students are offered a glamorous view of their post-college apartment life, and are urged to buy "quality" tableware, crystal, and cookware without delay.

9. AFS has been found to follow a racially discriminatory credit policy, under which white students receive better terms than blacks or hispanics. *See* United States v. American Future Systems, Inc., 571 F. Supp. 551 (1983), *aff'd*, No. 83-1766 (3d Cir. Sept. 5, 1984).

10. The University had "No Trespassing" signs posted near the entrance of each dormitory, and it required students to sign a housing contract that prohibited "any business enterprise for personal profit . . . in or around the university operated units." *AFS*, 464 F. Supp. 1254-55. In addition, the student handbook states:

of AFS, directed his sales representatives to begin booking demonstrations at Penn State.[11] A number of shows were, in fact, conducted, some being interrupted by Penn State officials who asked the AFS representative to leave. Satell asserted that the university's policy was unconstitutional in letters to Penn State officials.

In response to AFS's actions, Penn State refined its policy on commercial solicitation. The new policy restricted but did not completely prohibit AFS's demonstrations in university dormitories. The district court described the new policy in the following way:

> (1) AFS may conduct group demonstrations in specified common areas of each residence hall;

> The institution . . . has rights and responsibilities of its own. The rights and responsibilities of the institution include: . . . [the] [r]ight to prohibit individuals and groups who are not members of the University community from using its physical and operating facilities for commercial . . . activities.
>
> . . . .
>
> Lectures, concerts, demonstrations, displays, or exhibits may not be used in any manner as a means of promoting commercial companies, products, or services.
>
> . . . .
>
> The word "commercial" . . . means any activity or event which results in personal financial gain to the peddler or organization thereof, provided that contact between a peddler and a student shall not be deemed commercial if such contact was invited by the individual student involved.
>
> . . . .
>
> Persons who are not students or employees of the University, while on University property, are required to . . . abide by University policies and regulations.

AFS I, 618 F.2d at 253 (citations omitted).

11. AFS scheduled 51 demonstrations in the Penn State dormitories during the last two weeks of September 1977. *AFS*, 553 F. Supp. at 1274 (finding of fact No. 79).

> (2) following those demonstrations a student may invite an AFS representative to the student's room to purchase AFS goods; (3) AFS is free to solicit invitations to individual students' rooms at the group demonstrations or by telephone or mail; (4) AFS is not permitted to conduct group demonstrations in an individual student's dormitory room; (5) AFS is not permitted to consummate sales in individual dormitory rooms to a purchaser other than the occupant of the room; (6) AFS is not permitted to conduct group solicitations of sales in the common areas of residence halls; and (7) AFS is not permitted to consummate commercial transactions in the common areas of residence halls.

AFS, 553 F. Supp. at 1275; *see also American Future Systems, Inc. v. Pennsylvania State University*, 522 F. Supp. 544, 547 (M.D. Pa. 1981); *American Future Systems, Inc. v. Pennsylvania State University*, 510 F. Supp. 983, 985 (M.D. Pa. 1981). In addition, Penn State did not limit in any way the availability of other methods of communication between AFS and the students. AFS was free to solicit students directly by telephone and mail, and indirectly by advertising in the student newspaper and on the student radio station.[12] The company was also able to hold its demonstrations at the Nittany Lion Inn -- a motel on the Penn State campus -- or elsewhere in State College, Pennsylvania.[13]

Dissatisfied with Penn State's interpretation of its regulations, AFS filed suit, alleging that Penn State's

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12. *AFS*, 553 F. Supp. at 1272 (finding of fact Nos. 44, 45).

13. American Future Sys., Inc. v. Pennsylvania State Univ., 568 F. Supp. 666, 670 (M.D. Pa. 1983).

regulations infringed its constitutional right to free speech, and the right of students to hear that speech. The focus of AFS's challenge was on those aspects of the regulations permitting it to conduct demonstrations in the common areas of the dormitories but prohibiting it from consummating sales at the end of these presentations. The district court, after a trial, concluded that AFS could not raise the constitutional rights of the students, who were not then parties to the litigation, *see supra* note 2,[14] and that Penn State's regulations did not violate AFS's first amendment rights.[15] The court's decision turned on the availability of other channels for AFS to communicate product information to the students, including demonstrations that did not involve attempts to consummate immediate sales, and on the distinction between "commercial speech" and "soliciting sales."[16] The court held that Penn State's interests in protecting the privacy of dormitory residents, and in protecting students against "deceptive or potentially coercive practices," justified regulations that made it "more difficult for students to

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14. The court did not base its conclusion wholly on AFS's lack of standing, in the constitutional sense, to raise those issues, but on a number of factors, including that "facts in support of such a claim [i.e., one based on the student's rights] have not been pled or proven," and "assertion of the First Amendment rights of Penn State students by [AFS] would add nothing to the analysis of this case." *AFS*, 464 F. Supp. at 1259.

15. The district court, in this first trial, used an advisory jury, which made certain factual determinations. We will not distinguish between the findings made by the judge and those made by the jury, since we are not reviewing those findings here.

16. The court based this distinction on Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

obtain the type of information about commercial products which [AFS] seeks to distribute." *AFS*, 464 F. Supp. at 1262.

In *American Future Systems, Inc. v. Pennsylvania State University*, 618 F.2d 252 (3d Cir. 1980) ("*AFS I*"), we affirmed the district court. We concluded that the common areas of the Penn State dormitories are not "public forums" for first amendment purposes, and that "Penn State has articulated a legitimate interest" -- the preservation of the educational and residential atmosphere of the dormitories -- "which support[s] its ban on group sales activity in the dormitories." *Id.* at 257. We also held that Penn State's distinction between group political speech, which it permitted, and "group commercial speech," which it restricted, was not "arbitrary, capricious, or invidious," and thus was constitutional. *Id.* at 258-59.

Following our decision in *AFS I*, AFS requested permission from Penn State to hold demonstrations in individual students' rooms; its position, apparently, was that the constitutionality of Penn State's regulations regarding activities in the students' own rooms was left open by the *AFS I* ruling. Penn State denied AFS's request on the basis of its regulations. AFS then proposed that it be permitted to present group demonstrations in the common areas of the residence halls, although it agreed that, after *AFS I*, it had to abide by the University's requirement that actual sales be consummated only on a one-on-one basis in each student's room. The company forwarded to Penn State the printed text of its proposed group presentation. The University objected to certain parts of the presentation, characterizing these parts as "outright group commercial solicitation." Penn State insisted that the parts of the presentation outlining

the terms on which the AFS merchandise was being offered be excised from the show.[17]

Now joined by a group of Penn State students, AFS filed a new complaint, asserting that AFS had a right to conduct its entire demonstration, including those portions aimed at conveying information directly relevant to the sale of its goods, in the dormitory common areas, and to make sales to students other than the resident of a particular room at the end of those demonstrations. The students contended that they had a right to hold sales demonstrations in their individual dormitory rooms.[18] Two of the students who lived in the dormitories also asserted constitutional privacy rights, and state law rights under the Pennsylvania Landlord and Tenant Act. The district court granted summary judgment for Penn State, rejecting the first amendment claims of both the students and AFS primarily on the basis of *AFS I*; it also rejected the students' other claims. *AFS*, 522 F. Supp. 544.

In *American Future Systems, Inc. v. Pennsylvania State University*, 688 F.2d 907 (3d Cir. 1982) ("*AFS II*"), we reversed. We held that Penn State's attempt to prohibit AFS from including certain information in its sales demonstration was prohibited by the first amendment. We explicitly declined to address the question whether Penn State could ban commercial sales activity in the dormitories altogether,

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17. The information in this paragraph is taken from *AFS I*, 688 F.2d at 910-11.

18. The students also asserted freedom of association rights which the district court found to be "indistinguishable from the rights sought with respect to making group demonstrations and sales in their dormitory rooms." *AFS*, 522 F. Supp. at 552; *AFS*, 510 F. Supp. at 987.

but, relying on the test for commercial speech set out by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557 (1980), we held that the university's attempt to censor the presentation was a content-based regulation not based on a substantial government interest.[19] 688 F.2d at 912-13. We also concluded that the district court had failed to consider the students' associational rights and their rights to hear the "commercial speech" in their rooms independently of their rights to conduct the same activity in the common areas. After reviewing the record, we concluded that the university had not introduced any evidence to support its contention that the holding of AFS demonstrations in the students' rooms would interfere with its attempts to preserve a study atmosphere and that the summary judgment was, therefore, inappropriate.[20] We remanded the case to the district court for the factfinding made necessary by our opinion.[21]

The district court thereupon held a trial on the constitutionality of Penn State's restrictions on group sales demonstrations in individual rooms. AFS and the students presented expert testimony on the educational and social value of the AFS demonstrations, and student testimony concerning

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19. For a description of the *Central Hudson* test, *see infra* p. 20.

20. We affirmed the district court's rejection of the students' privacy claims. 688 F.2d at 915-16.

21. Penn State reacted to the first part of our holding in *AFS II* by promulgating a new regulation that no longer permitted use of the common areas of dormitories for commercial demonstrations. Thus, Penn State now prohibits AFS from conducting any kind of demonstration in any part of the dormitories. However, the comprehensive ban on the use of the common areas is not presently before us.

the reasons why particular students attended the demonstrations. Penn State's evidence consisted primarily of the testimony of Dr. Lee Upcraft, Director of Residential Life Programs, who explained a number of asserted justifications for the school's regulations, including that:

> (a) Such activity could invade the privacy of students;
> (b) Such activity could disrupt students while studying or sleeping;
> (c) Such activity could disrupt the educational and personal development programs of the Office of Residential Life Programs;
> (d) Such activity could disrupt the activities of student government;
> (e) Such activity could disrupt organized and informal and social and recreational activities of students;
> (f) Disruptions, to the extent that they occur, would be for a purpose unrelated to the purpose for which residence halls are dedicated;
> (g) The greater the frequency of the solicitation of money and sales of products and sales of service, the more likely disruptions would occur;
> (h) Such activity could displace some of the normal activities carried on in a residence hall;
> (i) Such activity would require Penn State to exercise controls on the commercial activities which could divert resources and efforts from the purpose for which they are now used;
> (j) Group solicitations and sales are incompatible with the uses to which the residence halls are dedicated; and
> (k) Group solicitations and sales have the potential for deception, fraud, and overreaching.

See AFS, 568 F. Supp. at 671; *AFS*, 553 F. Supp. at 1280.

The district court held that some of the governmental interests advanced by Penn State were not substantial, that the regulation was not reasonably calculated to advance some of the others, and that there was no factual substantiation for the remainder. *See AFS*, 553 F. Supp. at 1280-81 (preliminary injunction opinion); *AFS*, 568 F. Supp. at 671. On that basis, the court granted an injunction against the continued enforcement of the regulation.[22] This appeal followed.

II. *THE APPLICABLE LEVEL OF FIRST AMENDMENT SCRUTINY*

We are confronted in this case by a regulation that infringes on the right of AFS to disseminate, and of the Penn State students to receive, information directly related to the sale and purchase of AFS merchandise by the students.[23] As a threshold matter, we must determine the nature of this information for first amendment purposes, because there can be no doubt that "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs*

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22. The court held that only those plaintiffs currently residing in the Penn State dormitories who desired to host AFS demonstrations had standing to raise the issue of the constitutionality of the regulations.

23. The students also assert that their rights to "free association" are infringed by the regulation in question here, and that this infringement is independent of the infringement on speech. The district court rejected this argument. *AFS*, 522 F. Supp. at 552; *AFS*, 510 F. Supp. at 987. In *AFS II*, we implicitly treated the "speech" and "associational" interests as intertwined. 688 F.2d at 914-15. We now expressly hold that the students have not raised any "free association" claims independent of their "free speech" claims.

Drug Products Corp., 103 S. Ct. 2875, 2879 (1983); *see also, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 562-63 (1980); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978).[24]

The basis of the students' argument that they have separate "association" claims is that the dormitory regulations permit one-on-one sales in the dormitory rooms, but prohibits group sales demonstrations therein. Our conclusion in this case is that Penn State has a substantial proprietary and educational interest in regulating commercial speech in its dormitories in order to preserve their residential character and use, that the prohibition on group sales demonstration directly furthers that interest, and that Penn State's regulation is not excessive. *See infra* pp. 21-29. The exception for one-on-one sales is not inconsistent with the interest Penn State seeks to further; permitting individual sales does not involve the risk that commercial organizations will have an incentive to turn the dormitory into a "rent-free merchandise mart" because it does not provide them with the enhanced ability to reach the student market provided by group demonstrations. *See infra* pp. 24-25. The infringement on the students' associational rights in this case is limited -- there is no evidence that students are prohibited from inviting an AFS representative to a party as a social guest, as long as no commercial activity takes place -- and the infringement is directly related to the legitimate purpose Penn State is seeking to further by means of its regulation. We are aware of no authority for the proposition that where the state would have the power to regulate speech if it were made in a vacuum, the presence of a group of listeners, whose very presence gives rise to the state interest that justifies the regulation, gives the speech additional protection under the right of "free association."

24. Of course, the first amendment would not even be implicated if Penn State were not a "state actor" for purposes of the first amendment. Penn State has raised this issue, in light of three recent Supreme Court decisions, which have redefined the boundaries of the "state action" doctrine. See Lugar v. Edmondson Oil Co.,

AFS and the students argue that, because there are substantial educational, social, and cultural aspects to the AFS demonstrations, these demonstrations are entitled to the first amendment protection afforded "pure" speech, as opposed to the lesser protection applicable to "commercial" speech. In support of this position, two of the students testified about the non-commercial utility of the demonstrations, and two experts testified about their educational value.[25] The district court concluded on the basis of this testimony that "the communicative process at issue here, at least with respect to the students, does not involve solely commercial speech." *AFS*, 568 F. Supp. at 669.

The district court's reliance on the testimony concerning the non-commercial aspects of the demonstrations was misplaced. In *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875 (1983), the Supreme Court confronted an argument very similar to that advanced here by AFS and the students. Youngs

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102 S. Ct. 2744 (1982); Rendell-Baker v. Kohn, 102 S. Ct. 2764 (1982); Blum v. Yaretsky, 102 S. Ct. 2777 (1982). We have recently considered similar claims by Temple University and the University of Pittsburgh and concluded that those institutions are "state actors" on the basis of their close relationship with the state government. Krynicky v. University of Pittsburgh, 742 F.2d 984 (3d Cir. 1984) (consolidated with Schier v. Temple University). Since Penn State has a far closer relationship with the state than the University of Pittsburgh or Temple University, we believe that our analysis in *Krynicky* clearly establishes that Penn State is a state actor.

25. The students and experts explained that the AFS presentations were valuable to the students because they taught the students about fine china and about consumer credit purchasing, furnished the students with a worthwhile experience in relating to people, and generally provided a valuable real-life experience to students whose daily routine was otherwise very academic.

was engaged in the sale of contraceptive devices, and part of its advertising involved the mailing of pamphlets explaining the usefulness of condoms in avoiding venereal infection. The Court noted that the pamphlets were not "within the core notion of commercial speech" because they did more than simply propose a commercial transaction. Nonetheless, the Court held that, taken together, three factors provided "strong support" for a conclusion that the speech was commercial: (1) the speech involved was conceded to be an advertisement; (2) the speech referred to a specific product; and (3) the speaker had an economic motive for making the speech. The Court explained that mere discussion of important public issues in advertisements does not render them non-commercial. *Id.* at 2880-81.

We believe that this aspect of the case *sub judice* is controlled by *Bolger*. As in *Bolger*, the speech here is essentially an advertisement of AFS's wares, it specifically refers to AFS's products, and AFS's motivation for engaging in the speech is purely economic. There may be cases in which the character of the speech is unclear and in which testimony concerning the motivation of the listeners and the educational or social value of the speech might be relevant in determining whether the speech is commercial or pure for first amendment purposes.[26]

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26. For instance, if a non-commercial organization, such as the Campus Crusade for Christ, were to sell bibles or religious materials at meetings, the sales would not necessarily make the communication during the meeting commercial speech for first amendment purposes. The critical question would be whether the primary purpose of the organization was to sponsor religious activity or to sell Bibles, and the *Bolger* criteria would be applied in an attempt to answer this question. In such a case, testimony regarding the motivation of the speakers, as well as regarding the motivation of the listeners and the value of the speech, would no doubt be relevant to the *Bolger* analysis.

However, cases of this type will be rare, and this is not one of them. On the record before us, the speech in question is commercial as a matter of law.

Moreover, we do not believe, as the district court apparently did, that the speech at issue can be commercial for purposes of determining AFS's rights but pure for purposes of determining the students' rights. The *Bolger* criteria are employed to discern whether speech is, in its essence, part and parcel of a proposed commercial transaction. It is this connection to a commercial transaction that justifies the government's greater role in regulating the speech: such speech is more subject to abuse and less likely to be chilled by regulation than other types of communication. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Although, as we noted above, the motivation of the listeners may occasionally be relevant to a conclusion about whether the speech is commercial, the essential nature of the speech remains unchanged regardless of whose rights are being adjudicated, and the same test should be used whether it is the speaker's or the listeners' rights that are at stake. Thus, for the students as well as AFS, the speech here was undoubtedly commercial.

This conclusion, however, forces us to confront an unusual situation: the intersection between government regulation of commercial speech and the regulation of speech on government-owned property. Although the Supreme Court has set up a detailed analytic framework for determining the constitutionality of regulations in each of these situations, it has not, to our knowledge, been faced with the question of what test should be employed when both factors are present. If the two modes of analysis were equally applicable to the facts of this case, we would have to determine whether they yielded

different results, and, if so, we would have to choose between them in determining the validity of Penn State's regulation.

The analysis developed by the Supreme Court for speech on government property and the one for commercial speech are not, however, equally applicable to this case. In order to determine which of two "government property" tests to employ, we would have to decide whether student dormitory rooms are "public" or "non-public" forums. *See infra* pp. 21-22. For the reasons detailed below, *see infra* p. 23, we believe that dormitory rooms do not fit neatly into either the public forum or the non-public forum mold. As a result, neither analytic framework set out by the Court for speech on government property is completely appropriate here. Our best course of action, therefore, is to pursue the mode of analysis developed by the Supreme Court for cases involving commercial speech; we believe that this analysis is flexible enough to permit a throrough and proper weighing of all the factors and interests involved in this case.

In *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980), the Supreme Court set out a four-part test for asssessing the validity of restrictions on commercial speech. In accordance with this test, we must first determine whether the speech at issue concerns lawful activity and is not misleading; speech failing this initial part of the test is not entitled to any first amendment protection. Second, we must examine the government's asserted interests in regulating the speech, and we may uphold the regulation only if it is based on a substantial government interest. Third, we must ascertain whether the regulation directly advances the asserted governmental interest. Finally, we must be convinced that the regulation is no more extensive than necessary to carry out the government's

objective. *Id.* at 566; *see also Bolger*, 103 S. Ct. at 2881; *AFS II*, 688 F.2d at 913. We turn to application of the *Central Hudson* test.

III. *APPLYING THE CENTRAL HUDSON TEST*

The AFS product demonstrations easily get over the hurdle posed by the first prong of the *Central Hudson* test. The demonstrations clearly concern lawful activity, and the university does not contend that they are misleading.[27] The demonstrations are thus entitled to the first amendment protection afforded commercial speech.

The second step in the *Central Hudson* analysis is an evaluation of the governmental interests being offered to justify the restrictive regulation. Here, Penn State's long list of proffered justifictions for banning group demonstrations in the students' dormitory rooms, *see supra* p. 14, can be distilled into two major asserted interests. First, Penn State contends that, in its role as property owner, it may preserve its dormitories for their intended use and prevent them from becoming rent-free merchandise marts; second, the school asserts that, as educator, it may ensure that the dormitories maintain their residential and study-oriented atmosphere.

It has long been recognized that the government has a significant interest in dedicating its own property to a particular use. This interest, however, is not without limitation. Some parcels of government property, such as parks and streets, are effectively held in trust for the public "for purposes of assembly,

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27. Penn State does make the blanket assertion that group sales "*have the potential* for deception, fraud, and overreaching." *Supra* p. 14 (emphasis added). However, the university does not claim that AFS's demonstrations are, in fact, misleading, nor did it present any evidence to this effect in the district court.

communicating thoughts . . ., and discussing public questions." *Carey v. Brown*, 447 U.S. 455, 460 (1980) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). This kind of property is considered a "public forum," and the ability of the government to restrict speech on public forums is extremely circumscribed. Specifically, the government may adopt time, place, and manner restrictions in public forums only if they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *See Regan v. Time, Inc.*, 104 S.Ct. 3065, 3069 (1984); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2129 (1984); *United States v. Grace*, 103 S. Ct. 1702, 1707 (1983); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 647-48 (1981). Other property is dedicated by the government to a purpose inconsistent with public use as a forum for speech; in such "non-public forum" cases, the government may regulate speech so long as its regulation is reasonable and viewpoint neutral. *See Perry Education Association v. Perry Local Education Association*, 103 S.Ct. 948, 955 (1983) (policy giving representative union but not rival union access to teachers' school mailboxes held unconstitutional); *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129-30, 132-33 (1981); *Greer v. Spock*, 424 U.S. 828, 836 (1976).

If university dormitories were a public forum, Penn State's first justification for prohibiting the AFS demonstrations -- that such action is necessary to preserve the property for its dedicated use -- would clearly be insubstantial. Obviously, the state cannot prohibit speech on its property on the grounds that the prohibition is necessary to preserve the property for its intended use when one important purpose of the

property is to provide a forum for members of society to communicate information and ideas. On the other hand, if the property involved were a typical non-public forum, such as a federal office building, the government's asserted interest in maintaining that property for its intended use would indeed be grea..

This case is unusual, however, because university dormitories have characteristics of both public and non-public forums. With respect to outsiders, the students' dormitory rooms at Penn State appear to be non-public forums: they are certainly not in existence in order to facilitate general public communication. The university, therefore, has a legitimate proprietary interest in maintaining the dormitories for their intended use as residence halls and not as rent-free space for commercial vendors. For the students, however, not only do the dormitories resemble public forums but the university campus resembles society at large. Most students at a large public university like Penn State spend most of their time immersed in a world dedicated to the purpose of their education. They live in a dormitory, travel to and from classes on campus, listen to the college radio station, and read college newspapers. The government owns all of the property related to the students' world yet the students must be able to exchange ideas and information, including commercial information, somewhere on this property unencumbered by university restrictions;[28] hence, their interest in doing so in their own rooms is enhanced. As in the case of public parks, therefore, one

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28. Indeed, the Supreme Court has determined that meeting facilities on a university campus are public forums. Widmar v. Vincent, 454 U.S. 263 (1981). *See also* Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983) ("A public university may not constitutionally take adverse action against a student newspaper . . . because it disapproves of the content of the paper.").

important use of dormitory rooms is as a forum for speech uninhibited by governmental interference -- at least when such speech is desired by the students. For this reason, Penn State cannot meet the *Central Hudson* requirement of a substantial governmental interest merely by making the blanket assertion that it needs to restrict speech in the dormitories in order to preserve them for their intended use.[29]

Penn State, however, is more than a mere property owner; it is an educational institution. The university contends that, as educator, it must be able to maintain a residential and study-conducive atmosphere in the dormitories. There can be no doubt that a public university has a significant interest in carrying out its educational mission, and that this interest necessarily gives it some power to regulate its students' lives. While this interest, standing alone, might not be sufficient to meet the *Central Hudson* test, we believe that Penn State's proprietary interest (with respect to AFS and other outsiders) in ensuring that its premises do not become a rent-free merchandise mart, coupled with its educational interest (with respect to the students), constitute together a substantial justification for its attempt to regulate commercial speech in the students' dormitory rooms.

In accordance with *Central Hudson*, we must next determine whether the regulation at issue advances the government's asserted interest. Penn State wants to ensure that its dormitories remain a residential and

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29. A useful analogy might be made here to public housing projects. It is unclear whether a public housing authority could prohibit tenants in public housing projects from inviting companies such as AFS to conduct group demonstrations in their individual apartments solely on the grounds that, as property owner, the government has a substantial interest in maintaining the apartments for residential use.

study area for its 12,000 on-campus students. A population of 12,000 is a very tempting market for the sellers of innumerable products and services. Because relatively few college students have an automobile on campus, the ability of a seller to transact business on campus is an important factor in making sales. Furthermore, since the students generally live in close proximity to one another, there may be efficiencies or economies of scale in collectively soliciting them where they reside. When the fact that dormitories present potential vendors with a place to sell their goods rent free is added to these other considerations, it is not unreasonable to conclude that the character of the Penn State dormitories would be adversely affected in the absence of restrictions on commercial solicitation.[30] The university's restriction, therefore, directly advances its purpose.

Finally, we may uphold the regulation only if it is not excessive in light of the state's objective. This does

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30. We are not persuaded by the argument that what takes place in individual students rooms' does not impair the general atmosphere in the dormitories. AFS itself scheduled 51 demonstrations in the Penn State dormitories during two weeks in September 1977. *See supra* note 9. Each of these proposed demonstrations was supposed to involve a minimum of ten to fifteen students. *See supra* p. 6. Even if the demonstrations themselves were confined to individual students' rooms, the disruption from this type of activity is apparent.

Neither are we moved by AFS's reminder that the dormitories are frequent sites of rowdy student-sponsored gatherings which detract from the study atmosphere of the dormitories. The university has a legitimate interest in minimizing the number of intrusions, and, in addition, may legitimately target only commercial activity for regulation, much like a city may enact a zoning ordinance restricting only commercial activity in certain locations.

not mean, of course, that if lesser restrictions on AFS alone would be sufficient to maintain the atmosphere in the dormitories, the university's regulations must fail. Rather, we must be convinced only that Penn State's total ban on group demonstrations in the dormitory rooms is necessary given the effect of allowing *all* commercial vendors access to the students' rooms on the same terms. *See Clark v. Community for Creative Non-Violence*, 104 S. Ct. at 3071; *Heffron*, 452 U.S. at 2566-67.

In light of recent Supreme Court precedent, we believe that this last prong of the *Central Hudson* test cannot be read as a "least restrictive means" requirement. In *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984), the Court was faced with a National Park Service regulation that prohibited sleeping in certain parks in Washington, D.C. The Court of Appeals for the District of Columbia Circuit had held the regulation invalid because of its belief that the regulation could have been more narrowly tailored to meet the agency's purpose, which is a requirement under the "public forum" test. *See supra* p. 22. The Supreme Court reversed the Court of Appeals on this issue, stating:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the government interest in preserving park lands. . . . The Court of Appeals' suggestion that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage . . . and these suggestions represent no more than a

> disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe that [prior first amendment cases] assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise . . . .

Id. at 3072; *see also Regan v. Time, Inc.*, 104 S. Ct. at 3271-72 (plurality opinion of White, J.) ("The less-restrictive-alternative analysis invoked by [respondent] has never been a part of the inquiry into the validity of a time, place, and manner regulation."); *White House Vigil for the ERA Committee v. Clark*, No. 84-5271, slip op. at 21-28 (D.C. Cir. Oct. 26, 1984) (discussing Supreme Court's "rejection of the notion that courts may arbitrarily substitute their judgment for that of legislative or administrative institutions" in first amendment cases).

Although the Supreme Court has not yet addressed this issue in the context of the *Central Hudson* test, we see no reason for doubting that it would interpret the "no more extensive than necessary" language of *Central Hudson* in the same way it has interpreted the "narrowly tailored to serve a significant governmental interest" language in *Community for Creative Non-Violence*. Therefore, although we might be able to imagine alternative regulations that accomplish Penn State's objectives while interfering less with the students' and AFS's rights to communicate, we will not strike down the university's regulation on this ground. This court may not establish itself as the manager of Penn State's students and property, nor may it substitute its own judgment for Penn State's conclusion as to the best

means to carry out the university's legitimate ends. There is a whole realm of permissible means of accomplishing the university's objectives, and our function must be limited to determining whether the school has chosen an acceptable - not the least restrictive -- alternative.

Penn State's regulation does not prohibit all commercial information from reaching its students while they are in their dormitory rooms. If invited by a student, a commercial vendor may conduct a one-on-one demonstration and sale in that student's own room. Moreover, the telephone, mails, student newspaper, and college radio station are all available to commercial entitities who desire to advertise in the student market. In addition, the university's regulation does not prohibit all group solicitation on state-owned property: Penn State has indicated its willingness to make a facility on campus, the Nittany Lion Inn, available to AFS and other vendors for group sales demonstrations.

We believe that the existence of ample alternative means for students and vendors to exchange commercial information in the dormitories and elsewhere confirms that Penn State's restriction is carefully tailored to carry out its intended purpose. The university does not want its dormitory rooms converted, in effect, into rent-free space for commercial vendors because it fears that such a result would prevent it from maintaining the dormitories as a place where students can reside and study without disruption. It has acted on this fear by banning all on-site group commercial solicitation on an equal basis, while permitting all other types of commercial communication between its students and outside vendors. We cannot say that this limited restriction on commercial speech is excessive.

IV. *CONCLUSION*

In sum, we hold as follows:

(1) the group demonstrations that AFS desires to conduct constitute commercial speech for first amendment analysis with respect to the rights of both AFS and the students;

(2) the demonstrations are not unlawful or misleading, and they are therefore entitled to first amendment protection;

(3) Penn State's regulation banning group commercial solicitation in its students' dormitory rooms is constitutional because it directly advances the university's substantial (governmental) interests, as property owner and educator, in maintaining its dormitories as a residential and study area for its students and in preventing their use as a rent-free merchandise mart, and because the regulation is not excessive in light of this objective;

(4) the privacy claims asserted by the students are barred by res judicata.[31]

The judgment of the district court will be reversed and the case will be remanded with instructions to enter judgment on the merits for Penn State.[32]

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31. In *AFS II*, we rejected the students' claim that the regulation violated their "privacy" rights. *See supra* note 18. Although the students re[illegible]ed these claims on this appeal, they have raised no argument that explains why these claims are not barred by our decision in *AFS II*. We therefore reject them.

32. Judge Sarokin's suggestion that this case could be disposed of simply by holding that AFS's speech is not entitled to first amendment protection because of its unlawful or misleading nature is very attractive. The problem with his approach is that the district court did not make sufficient findings to support it. Neither is our opinion in United States v. American Future Systems, Inc., *see* note 3, *supra*, sufficiently particularized or encompassing to conclude the issue.

ADAMS, *Circuit Judge*, concurring

Reasonable persons undoubtedly will differ over the appropriate scope of freedom of expression; indeed, one of the First Amendment's special strengths is that it ensures that the question of its ambit is itself a proper subject of free and vigorous debate. Spirited exchanges are likely to arise over virtually any First Amendment issue, and to a considerable extent the very existence of those exchanges demonstrates the vitality and value of the Amendment's guarantees. The fact that this case, involving a corporation's right to hawk housewares in a college dormitory, has elicited, to date, seven judicial decisions, is in some respects a testament to the importance and complexity of the First Amendment.

But no matter how critical the First Amendment and its doctrinal evolutions may be, it is necessary that we not lose sight of precisely what is at stake in the matter at hand. We are asked to extend the Amendment's protection to a commercial vendor who seeks free access to state university property in order to sell china and kitchenware to students. It is my view that from whatever perspective one approaches this case, the First Amendment cannot be held to bar the challenged state regulation. I concur with the majority's result and reasoning, and write separately mainly to note that several independent lines of analysis provide equally strong support for the result reached today.

First, I agree that the speech at issue is commercial as a matter of law. The commercial speech doctrine, which offers lesser protection for commercial than for non-commercial communications, has been criticized almost since its inception for its failure to develop a hard and fast definition for this type of speech. *See* Baker, *Commercial Speech: A Problem in the Theory*

of Freedom, 62 Iowa L. Rev. 1, 42-43 n.146 (1976); Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 26-39 (1980). The drawbacks created by this definitional difficulty are manifest -- commercial speech, if too broadly defined, may well extend to encompass speech that also carries political or self-expressive import, and the distinction may then serve to diminish important First Amendment protections. The present case makes evident, however, that similar dangers inhere in *not* distinguishing between commercial and non-commercial speech. To suggest that there is an absolute First Amendment right to sell kitchenware in state university dormitories is in my judgment to denigrate competing rights of the university and its students, and to invite dilution of the amendment by its tortuous application to the current controversy. *See Ohralik v. Ohio State Bar*, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.") While the line between commercial and non-commercial speech may be difficult to draw in borderline cases, as I see it kitchenware sales do not require us to approach that borderline. *See* majority opinion at 16-18; *see Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139-40 (3d Cir.) *cert. denied*, 456 U.S. 975 (1982) ("The important question is whether the publication as a whole relates solely to the economic interest of the speaker and its audience.") The communication at issue here is clearly speech proposing a commercial transaction, and nothing more. *See Ohralik*, 436 U.S. at 455-56.

Once it is determined that commercial speech is involved, one of several lines of analysis may be

pursued to determine the validity of the regulation: The majority applies the *Central Hudson* test.[1] An equally plausible approach would be to treat Penn State's regulation as a reasonable time, place, and manner restriction. The University has a policy not to open its dormitories to general commercial solicitations. The specific restriction at issue here is the University's prohibition of a certain manner of commercial speech -- group sales -- in a specific place -- individual student dorm rooms. The University does not seek to prohibit commercial speech altogether; in fact, it allows one-on-one sales in dorm rooms, direct solicitation of sales by telephone and mail, advertising in the student media, and group sales demonstrations at the Nittany Lion Inn, an attractive motel located on the campus.

Time, place, and manner restrictions are valid "provided [1] that they are justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a governmental interest, and [3] that they leave open ample alternative channels for

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1. While I agree that the regulation here satisfies the requirements of *Central Hudson Gas*, I am not certain that these requirements need to be met within the context of this case, given the limited nature of the regulation. As I noted in an earlier opinion in this litigation, in virtually every instance where the Court has struck down regulation of commercial speech, including *Central Hudson Gas*, the regulation involved flatly prohibited speech about a certain commercial subject. *See* American Future Systems v. Pennsylvania State University, 688 F.2d 907, 917-19 (3d Cir.) (Adams, J., dissenting from denial of rehearing), *cert. dismissed*, 459 U.S. 1093 (1982). Here, however, the University makes no attempt to suppress information regarding kitchenware sales, but asks only that such information not be conveyed through group sales in a dormitory room.

communication of the information." *Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3069 (1984) (see also cases cited therein). The limitation here meets all three criteria.

The first element -- that the restriction be content-neutral -- must be read to mean content-neutral *within the category of commercial speech*. That is, a court must first determine whether the limitation covers commercial or non-commercial speech, and then ascertain whether, within either category, the limitation is content-neutral. This reading is required by the Supreme Court's language in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 781 (1976), where the Court expressly noted the possibility of "time, place, and manner restrictions *on commercial speech*."[2] In *Virginia State Board*, the Court held that the statute at issue did not meet time,

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2. Thus, while at first glance it may appear anomalous to label as content-neutral a regulation that differentiates between commercial and non-commercial speech, the distinction is one that is recognized and endorsed by First Amendment doctrine itself. As Justice Stevens has noted, "the measure of constitutional protection to be afforded commercial speech will surely be governed largely by the content of the communication." Young v. American Mini-Theatres, 427 U.S. 50, 69 (1976). *See also* American Future Systems v. Pennsylvania State University, 568 F. Supp. 666, 670 (M.D. Pa. 1983).

> To propose that a state cannot impose time, place and manner restrictions on commercial speech unless it also extends these restrictions to non-commercial speech would lead to a truly anomalous result. If such were the rule, commercial speech would receive the same First Amendment protection as non-commercial speech when it is merely limited by prohibition from certain places, but would have a *lower* level of protection when the state seeks to suppress it

place, and manner requirements, because it singled out speech of a particular content -- the prices of prescription drugs -- and left open no alternative channels to communicate such information to prospective customers. 425 U.S. at 771. Similarly, if the University denied access to AFS while allowing Tupperware parties, or if it distinguished between, for example, cookware and jewelry sales, the regulation could not be construed as a content-neutral time, place, and manner restriction. Here, however, the regulation forbids all commercial speech in the form of group sales in dormitory rooms.

The second and third requirements of the time, place, and manner rule are also met. As the majority notes, the University has a substantial interest in not allowing its dormitories to become "rent-free merchandise marts," and a multitude of alternative channels are made available to AFS to communicate information to the students regarding its products. Thus, the University's restriction on commercial speech in its dormitories is valid as a reasonable time, place and manner restriction. *See Grayned v. City of Rockford*, 408 U.S. 104 (1972)(anti-noise statute restricting speech near schoolgrounds held

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altogether. *See generally*, Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1282 (1983); Note, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 G.W. L. Rev. 127 (1983). The Note characterizes Ohralik v. Ohio State Bar Assn, 436 U.S. 447, as implicitly applying a time, place or manner rule to commercial speech. 52 G.W. L. Rev. at 135-37. While the Supreme Court has not yet expressly employed such an approach in the commercial speech context, lower courts have done so. *See* John Donnelly & Sons v. Campbell, 639 F.2d 6, 9 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981); Lovett & Linder, Ltd. v. Carter, 523 F. Supp. 903, 909 (D.R.I. 1980).

constitutional); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upheld prohibition on picketing near a courthouse); *Breard v. Alexandria*, 341 U.S. 622 (1951) (upheld restrictions on door-to-door magazine solicitations).[3]

An analysis of the University's regulation must also, I believe, consider the issue "in light of the special characteristics of the school environment." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969). The school cases provide both an independent basis for the result reached by the majority, as well as an underlying consideration crucial to the other lines of analysis. In the ordinary setting, the court must weigh the interest of the state against the individual's interest in free speech. The university

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3. The University regulation is analogous to a city zoning ordinance that forbids commercial use of property in a residential area. Such zoning ordinances are commonplace, and would generally withstand constitutional attack as reasonable time, place, and manner restrictions on commercial speech. A plurality of the Supreme Court held in Young v. American Mini-Theatres, 427 U.S. 50 (1976), over a vigorous dissent, that zoning restrictions are legitimate in some cases even for protected non-commercial speech. Justice Powell and Justice Stewart, neither of whom were part of the plurality in *American-Mini Theatres*, suggested in a more recent concurrence that an ordinance banning all commercial activity in a residential area would be "appropriate and valid." Schad v. Borough of Mount Ephraim, 452 U.S. 61, 79 (1981) (Stewart and Powell, J., concurring). We would, of course, be faced with quite a different question if there were a credible suggestion that the purpose of the restriction here was to inhibit the sales of kitchenware, rather than to preserve the educational and residential character of a dormitory. *See* Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 94 (1977) (distinguishing between legitimate regulations aimed at "secondary effect" of speech at a particular place and illicit regulations aimed at the "primary effect" of speech, i.e., that listeners will act upon it).

setting requires consideration of a third factor -- the institutional autonomy of an academic body.

The Supreme Court has often emphasized the danger of judicial intervention in scholastic affairs. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5; id. at 279 n.2 (Stevens, J., concurring); *University of California Regents v. Bakke*, 438 U.S. 265, 312 (opinion of Powell, J.) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment"); *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *Epperson v. Arkansas*, 303 U.S. 97, 104-05 (1968). While the Court did intervene in each of these cases, it was careful to admonish that intervention was justified only "where essential to safeguard the fundamental values of freedom of speech and inquiry and belief." *Epperson*, 393 U.S. at 104-05, citing *Developments in the Law-Academic Freedom*, 81 Harv. L. Rev. 1045, 1051-55 (1968); *see also id.* at 1150-1152 (discussing institutional autonomy and judicial review).

Thus, the Supreme Court has interposed itself in academic affairs when a state legislature sought to control curricula by flatly forbidding the teaching of evolution, *Epperson*, 393 U.S. 97; where school officials sought to suppress symbolic expression protesting United States involvement in Vietnam, *Tinker*, 393 U.S. 503; and where a state university refused to recognize certain student groups on the basis of their religious or political beliefs. *Widmar*, 454 U.S. 263; *Healy*, 408 U.S. 169. The question we face today is whether the sale of kitchenware may implicate sufficiently fundamental First Amendment concerns to justify a court's intrusion in the affairs of Penn State University. I believe that there are indeed "commonsense differences" between speech about the

theory of evolution, religious commitment, and political dissent, on the one hand, and kitchenware sales on the other. *See Virginia State Board*, 425 U.S. at 771 n.24. To extend the arm of the federal courts to protect the latter would be to demean the importance of the former, and to ignore the institutional autonomy of the University. Our Court has refused to intervene in academic affairs in far closer cases of speech regulation than the sale of kitchenware in dormitory rooms. *See, e.g., Seyfried v. Walton*, 668 F.2d 214 (3d Cir. 1981) (court did not disturb order of high school superintendent forbidding the dramatic production of "Pippin").

The public school context leads to a fourth line of analysis supporting the University's regulation. When confronting the issue of a speaker's access to public property, the court must look to the nature of the forum. Where the state has created a public forum for open expressive activity, *Widmar v. Vincent*, 454 U.S. 263 (university meeting facilities open to all student groups except religious groups), or where the forum is one traditionally devoted to public communication, *Hague v. CIO*, 307 U.S. 496 (1939) (parks or streets), any content-based exclusion must be narrowly tailored to achieve a compelling state interest. *Carey v. Brown*, 447 U.S. 455, 461 (1980). All public property, however, is not a public forum. Where public property is "not by tradition or by designation a forum for public communication," the state is allowed to "reserve the forum for its intended purpose, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn v. Perry Local Educators' Assn*, 103 S. Ct. 948, 955 (1983).

The medium at issue in *Perry Education Assn* was a public school's internal mail facilities. The Supreme

Court upheld the school's refusal to allow a rival union access to the mail system, even though the school provided access to the union that represented its teachers and to several civic organizations. The Court relied on the fact that the mail system was not "open for use by the general public." 103 S. Ct. at 956. Similarly, here, the university dormitories are not open to the general public. *See* Majority Opinion, at n.8. As the Court in *Widmar* noted:

> A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and non-students alike, or that a university must grant free access to all of its grounds or buildings.

454 U.S. at 267-68 n.5.

Moreover, there is no contention here, as there was in *Perry Education Assn*, that the University has selectively sought to restrict one speaker because of its particular viewpoint. *See Perry Education Assn*, 103 S. Ct. at 957. There is nothing in the record suggesting that the University sought to suppress the sale of kitchenware on ideological grounds; indeed, it is virtually inconceivable that it would. As such, a pertinent question to be addressed is whether the restriction is "reasonable in light of the purpose which the forum at issue serves." *Perry Education Assn*, 103 S. Ct. at 957. Surely, it is not unreasonable to restrict the access of commercial vendors to a student dormitory; such a restriction takes into account both

EDITOR'S NOTE

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the interest of the university in minimizing disruption of students' studying and privacy, and the University's interest in not transforming its dormitories into commercial emporiums.

The fact that the regulation at issue here can be supported on a variety of independent grounds might be said to suggest confusion in the law of the First Amendment. I draw quite the opposite conclusion. The diversity of First Amendment analyses has developed precisely as a result of the Amendment's scope and importance. The Amendment is broadly phrased because the potential for violations of a speaker's or listener's rights to expression and information are manifold; the various doctrines that have evolved demonstrate an effort to apply the amendment in a wide range of contexts, implicating innumerable competing interests and interlocking issues. That each of these analyses intersects to support the result here only underscores the point made at the beginning of this concurrence.

With all due respect, I do not believe that the First Amendment's protection of a free and robust marketplace of ideas requires that a university dormitory be turned into a marketplace for a private corporation's sale of kitchenware.[4]

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4. While I agree with Judge Sarokin that the record indicates that AFS has been less than upright in some of its practices, I am less certain that the "misleading or related to unlawful activity" exception to commercial speech protection may be extended to the facts of this case. The Supreme Court has denied First Amendment protection to "speech proposing an illegal transaction." Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 496 (1982) (commercial speech promoting illegal drug use), and to speech which is itself illegal. Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973) (want ads discriminated on basis of sex). In less clearly egregious cases regulations have been

SAROKIN, *District Judge*, concurring:

I have one disagreement with the majority's excellent opinion, with which I join. However, I write separately because, in my view, this case could be and should be decided on much narrower grounds. Commercial speech is entitled to first amendment protection only if it is neither misleading nor related to unlawful activity. Appellee's activities do not meet this test.

The majority states that "AFS product demonstrations easily get over the hurdle posed by the first prong of the *Central Hudson* test. The demonstrations clearly concern lawful activity, and the university does not contend that they are misleading." Majority typescript at 20. I respectfully disagree with both of these conclusions. First, the university, in fact, asserts its interest in regulating AFS product demonstrations because "[g]roup solicitatons and sales have the potential for deception, fraud and overreaching." Majority typescript at 14, 21 n.5. Moreover, in its initial brief, the university stated

> There is no question that Penn State is concerend with the deceptive sales tactics of AFS. The record establishes that AFS provides a written "script" for

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upheld, but only after the Court afforded commmercial speech some protection and then weighed competing interests. *See* Ohralik v. Ohio State Bar Assn, 436 U.S. 447 (1978). Moreover, the fact that some of AFS' activities have been adjudged illegal does not necessarily render all of its speech unprotected. Since I believe that the regulation is valid even if the speech is assumed to have some commercial speech protection, I am reluctant to extend the contours of the "misleading or related to unlawful activity" exception. My reluctance is heightened by the fact that the district court here did not make sufficient findings with respect to whether AFS's practices were deceptive or illegal to permit an appropriate review of this contention.

> its sales representatives, and that the script was deceptive and misleading in three respects. First, it misrepresented the nature of the two-year "peace of mind" guarantee by failing to disclose that a purchaser could not exchange merchandise if it was used even once. Second, it misrepresented the AFS credit policy by failing to disclose that the policy differed for blacks and Hispanics. Third, the script failed to provide for oral notification to the purchaser at the time of consummation of the sale of the right to cancel within three days, as required by federal and state law.

Appellant's Brief at 44 (citations omitted). At that time, the university argued that such representations, among other factors discussed in the majority opinion, rendered its regulation reasonable. After oral argument, and in a Supplemental Brief requested by the court, the university refined its position:

> Penn State, both in AFS I and the present case, introduced evidence showing that AFS credit policies were discriminatory and that certain AFS sales techniques were deceptive and misleading. *The purpose of such evidence, however, was to demonstrate that such speech is not in the first instance proctected by the First Amendment, the initial element of any First Amendment analysis.*

Appellant's Supplemental Brief at 28 (emphasis added). The question was thus squarely presented for review by this court.

At trial, ample evidence was presented of the fraudulent practices documented by the university. Thus, the failure fully to disclose either AFS's exchange policy, *see* App. 1136 (Defendant's Exhibits D-22.1-22.3), or a buyer's right to cancel the contract within three days, *see* App. 1140-41 (Defendant's

Exhibit D-40), are fully borne out by the evidence.[1] Furthermore, as the majority recognizes, AFS's offer of a free vacation for its on-campus host or hostess is itself deceptive. Majority typescript at 5 n.4. More important, this court has recently concluded that AFS's policies "discriminated on prohibited bases such as race, sex and marital status which were not related to the social need those [policies] sought to address," *United States v. American Future Systems, Inc.*, 743 F.2d 169, 182 (3d Cir. 1984), in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.*. The court wrote:

> Despite all of the disadvantages that women have had, historically and at present, the significant disadvantages suffered by white women have been far less than those disadvantages black women, Native American women (Indians), Hispanic and other minority American women have had to endure for centuries. Yet the paradox of AFS's plan is that it perpetuates the past disparities between white and minority women and rather than helping all women it aids only white women and slams the door of equal credit opportunity in the faces of minority women.

743 F.2d at 181.

Taken together, these facts paint a picture of appellee AFS seeking first amendment protection for fraudulent or misleading speech, in the pursuit of

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1. The university alleges that the latter practice violates federal and state law, both of which require *written* notification of the right to cancel within three days. *See* 16 C.F.R. § 429.1(b); 74 P.S. § 201-7(b). Although the district court originally found otherwise, *see AFS*, 466 F. Supp. at 39, the contract introduced into evidence here did not contain the required provision. There was, however, oral notification of such right. App. 1136.

policies which are discriminatory on the basis of race and sex.[2] The Supreme Court had, as the majority states, made clear that such speech, which is either unlawful, misleading or both is not entitled to first amendment protection. Majority typescript at 20, citing *Central Hudson*, 447 U.S. at 546. *See also Bolger*, 103 S. Ct. at 2881; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 426 U.S. 748, 771 (1976). Of course, protecting the public from being misled, a goal which, the district court found motivated the university, may justify state regulation infringing speech.[3] Moreover, the illegality of AFS's credit policies as found by this court just a few months ago, ought alone bar AFS from seeking to clothe such activities in first amendment protective garb. *See, e.g., Village of Hoffman Estates v. Flipside,*

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2. Clearly, this picture concerned the university; indeed, once having viewed it, the university was apparently motivated by it to take the actions here at issue. *Compare AFS*, 553 F. Supp. at 1275 ("The real concern of Defendants has to do with monitoring the 'high pressure salesmanship' of employees of AFS.") *with AFS*, 464 F. Supp. at 1257 ("In the fall of 1977 Penn State officials did not know of American Future Systems' credit policy or its policy with respect to the "Florida holiday' drawings . . . American Future Systems was prohibited from conducting sales demonstrations at Penn State because of Penn State's policy against such commercial activity occurring within the residence halls rather than because of any view held by Penn State officials as to the propriety or impropriety of American Future Systems' credit plans or its policy with respect to the 'Florida holiday' drawing.").

3. *Compare, e.g., Friedman v. Rogers*, 440 U.S. 1, 13-16 (1979) (state regulation justified); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 461-62 (1978) (same); *United States v. Reader's Digest Association, Inc.*, 662 F.2d 955, 964-65 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982) (F.T.C. order designed to prevent false or misleading statement justifies regulation of speech) *with Bates v. State Bar of Arizona*, 433 U.S. 350, 372-73 (1977) (state regulation not justified on grounds of potential deception of the public).

Hoffman Estates, Inc., 455 U.S. 489, 496 (1982); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388 (1973) (first amendment does not protect advertisements deemed discriminatory). As the Supreme Court has stated, with respect to advertising, only "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, 455 U.S. 191, 203 (1982).

Therefore, although I can find no fault with the reasoning or principles enunciated in the majority opinion, it begins the analysis where it could have ended it. Before AFS can mount a constitutional attack upon the regulation imposed by Penn State, it must establish its entitlement to do so. By decision of this very court, however, AFS is engaged in activities which unlawfully discriminate; the record below demonstrates a pattern of fraud and misrepresentation as well. Under such circumstances, AFS is not entitled to the learned analyses that it here receives at the hands of this court, but rather a rejection of its claim because its conduct does not entitle it to first amendment protection. In the commercial arena, no company or person has a constitutional right to speak words which are intentionally misleading, particularly when such speech furthers a commercial venture which discriminates on the basis of race and sex.

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Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2674

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOAN D. VARSICS, DENNIS C. HABECKER, KEVIN GRAVES and JOHN B. SPILLAR,

Appellants

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, and M. LEE UPCRAFT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 81-0171)

Argued April 2, 1981
Before: GIBBONS, SLOVITER and BECKER,
Circuit Judges

(Filed August 9, 1982)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Plaintiff American Future Systems, Inc. (AFS) filed suit against Pennsylvania State University, its trustees

and agents (jointly referred to as Penn State) alleging that Penn State's application of its policies relating to commercial activities in the common areas of its student residence halls violated its First and Fourteenth Amendment rights to free commercial speech as established by this court in an earlier opinion. Several students at Penn State also joined as plaintiffs alleging that Penn State's policies with regard to activities in the common areas and in the dormitory rooms violated, *inter alia*, their noncommercial free speech rights and right to privacy. Plaintiffs appeal the district court's grant of defendants' motion for summary judgment. We reverse and remand.

I.

BACKGROUND

AFS is a corporation which engages in the sale of cookware, crystal, and tableware through demonstrations of its merchandise at colleges throughout the United States. These demonstrations are attended by a student hostess, invited guests and a sales representative. Four of the student plaintiffs, Bruce Del Valle, Joan D. Varsics, Dennis C. Habecker and John B. Spillar, are current Penn State students who do not reside in the University residence halls. Plaintiff Keven Graves is a Penn State student who currently resides in the residence halls. Plaintiffs Steven Brubaker and Richard J. Wingert were living in the University residence halls at the time the action was filed.[1] It is conceded that as long as one plaintiff is a student who resides in the residence halls to which the contested regulations apply, the issues are properly before us.

In the prior opinion rendered in the earlier action brought by AFS we described Penn State's policies and regulations covering commercial activities in its dormi-

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1. Wingert withdrew from Penn State in February 1981. Brubaker is still a student at Penn State, but no longer resides in the residence halls.

tories in detail. *See American Future Systems, Inc. v. Pennsylvania State University*, 618 F.2d 252 (3d Cir. 1980) (*American Future Systems I*). These regulations and policies have not changed to any significant extent. App. at 322a. In summary, the student housing contract provides "[t]he conducting of any business enterprise for personal profit is prohibited in or around the university operated units." The student handbook states:

> "The institution . . . has rights and responsibilities of its own. The rights and responsibilities of the institution include: . . . [the] [r]ight to prohibit individuals and groups who are not members of the University community from using its physical and operating facilities for commercial . . . activities."
>
> "Lectures, concerts, demonstrations, displays, or exhibits may not be used in any manner as a means of promoting commercial companies, products, or services."
>
> "The word 'commercial' . . . means any activity or event which results in personal financial gain to the peddler or organization thereof, provided that contact between a peddler and a student shall not be deemed commercial if such contact was invited by the individual student involved."
>
> "Persons who are not students or employees of the University, while on University property, are required to . . . abide by University policies and regulations."

618 F.2d at 253 (citations omitted).

Penn State's interpretation of these policies and regulations as relevant to the issues in this case is set forth in its brief as follows: "Under that policy, AFS may conduct group demonstrations of its products in common areas of Penn State residence halls. No solicitation of sales or sales may occur in those demonstrations. Following that demonstration, or by direct mail or tele-

phone, AFS may secure invitations from a student to solicit sales and sell merchandise to that student in his or her dormitory room." Brief of Appellees at 5.[2] AFS challenges the manner of application of the regulation to the demonstrations in common areas of the residence halls. The student plaintiffs challenge the preclusion of demonstrations in the dormitory rooms. The issues will be considered separately.

II.

AFS'S CHALLENGE

In *American Future Systems I*, AFS had challenged Penn State's regulation of group commercial activities in the residence halls. AFS had conducted and scheduled future demonstrations in the residence halls of Penn State. As part of such demonstrations, AFS conducts other solicitation activity including door-to-door visits accompanied by the student hostess to seek guests for the demonstration. The demonstrations were halted by University officials because they violated the policy banning commercial activity. "When AFS protested that it had a constitutional right to solicit sales within the residence halls, a Penn State official told AFS that it would be permitted to conduct the demonstration portion of its show if no attempts were made to sell merchandise to the students during the presentation. AFS rejected that arrangement, stating that the sales portion was absolutely crucial." 618 F.2d at 254 (footnote omitted). In affirm-

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2. In *American Future Systems I*, 464 F. Supp. 1252, 1256 (M.D.Pa. 1979), the district court found that:

> A sales demonstration put on by American Future Systems generally proceeds in two parts: A demonstration of the American Prestige Series products including a comparison of those products with other merchandise and an explanation of why American Prestige products are superior, and a sales portion where interested students are given an opportunity to purchase products on an installment plan basis.

ing the judgment entered in Penn State's favor, we emphasized that Penn State had not "totally suppressed" commercial speech, but "merely restricted that speech somewhat." *Id.* at 258. We stressed that "not only is AFS free to sell its goods elsewhere than in the residence halls, it can even enter those halls, upon invitation, and set up group demonstrations of its products. All that it is restricted from doing is actually completing in those halls its desired commercial transactions." *Id.* at 259.

Shortly thereafter, AFS requested that Penn State permit it to conduct group demonstrations in individual students' rooms. App. at 20a. Under its proposed scheme actual consummation of sales would occur in the purchaser's own room on a one-on-one basis. Penn State rejected this proposal on the ground that such activity would not conform with University policy. *Id.* at 22a.[3]

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3. In a letter dated October 3, 1980, counsel for Penn State explained the reason for rejecting AFS' proposal as follows:

> Generally speaking, requests [to conduct group demonstrations in the public areas of the dormitories] are honored where the "demonstration" has educational value, does not interfere with the normal activity of the area and does not involve an outright solicitation of a commercial sale.
>
> The "demonstration" may result in the consummation of a commercial transaction if the student pursues the matter at the place of business of the vendor or if the student invites the vendor to his or her room to meet on an individual basis. In addition, an individual student may invite a vendor to the student's room, whether or not a "demonstration" has occurred for the consummation of a commercial solicitation and sale with that student only.
>
> However, group "demonstrations" or group sales by commercial organizations, or others who are not residents, are not permitted in the private areas of the residence halls, including the rooms of the students.
>
> The purpose behind these distinctions is to try to achieve a balance between the personal needs of the individual student and the needs for privacy and maintenance of a proper study atmosphere for large numbers of students living in communal facilities.

AFS then proposed that it be permitted to present group demonstrations in the common rooms of the residence halls. App. at 29. It forwarded to the University a copy of the printed text (consisting of 76 cue cards) of its proposed presentation and explained that the material contained in cards 1 through 67 would be presented in the group demonstration, whereas the material in the remaining cards would be "modified for a one on one closing transaction." *Id.* at 30a. Thereafter, University officials reviewed the cards and determined that although "the presentation does contain much material of an educational nature which would be permitted," certain of the material contained "an outright group commercial solicitation which is contrary to University policy." *Id.* at 69a. In a letter to AFS, dated November 20, 1980, Penn State's counsel enumerated which material — primarily those cue cards containing price, guarantee and payment plan information — was not permissible.[4]

In this action for injunctive and declaratory relief, AFS seeks an order "requiring the University to comply with this court's prior interpretation of the effect of its regulations" and thus to allow AFS to present

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Although these distinctions may not be entirely logical, and although it may be difficult to tell the difference between a "demonstration" and an outright commercial solicitation, the policy by and large has achieved its purpose.

App. at 26a-27a.

4. The letter stated that "the material starting with the bottom paragraph of card 14 through the second paragraph on card 18 is not permissible because cooking by students, or anyone else, is not permitted in the residence halls." App. at 69a. The letter also rejected the material on cards 24-31 (relating to the price of AFS's china and guarantee and payment plans offered to students); the first paragraph of card 37 (relating to the price of AFS's crystal); cards 52-65 (relating to the price of AFS's cookware and package plans, guarantee and payment plans, and the Florida holiday drawing); and "those portions of cards 66-67 which involve the distribution of contracts to the group." *Id.*

uncensored group demonstrations in the common areas of the residence halls upon invitation by a resident student and to consummate sales on a one-on-one basis with a student who has invited an AFS representative back to his or her private dormitory room. The district court denied plaintiffs' motion for a preliminary injunction without a hearing, *American Future Systems, Inc. v. Pennsylvania State University*, 510 F. Supp. 983 (M.D. Pa. 1981), and subsequently, again without giving plaintiffs a hearing, granted Penn State's motion for summary judgment. *American Future Systems, Inc. v. Pennsylvania State University*, 522 F. Supp. 544 (M.D. Pa. 1981).

AFS argues that Penn State's refusal to allow it to present uncensored sales demonstrations in the common areas of University residence halls is violative of its First Amendment rights and contrary to this court's prior interpretation of what commercial activity Penn State may permissibly prohibit in its residence halls. The district court rejected these contentions primarily on the ground that they were barred by the doctrine of res judicata. It construed AFS's claims as an attempt to relitigate claims which either were advanced and decided in the first action or which could have been advanced. 522 F. Supp. at 548. It rejected AFS's claim that the University's attempt to censor its sales demonstrations was violative of the First Amendment on the ground that this court had "specifically upheld Penn State's regulations to the extent they rested upon a distinction between commercial and non-commercial speech." *Id.* at 549. Finding that "the question of whether particular aspects of AFS's presentations were educational or commercial" was not barred by res judicata, the district court independently examined the 67 cue cards at issue and found that those cards containing price, credit and guarantee terms constituted impermissible solicitation. It therefore, upheld Penn State's prohibition of cards 24-31, the first paragraph of card 37, 52-65, and portions of cards 66-67. See note 4, *supra*.

We disagree with the district court's conclusion that the claims advanced by AFS in this appeal are barred by res judicata. At the time of our prior decision, there had been no attempt by the University to censor AFS's sales demonstrations by prohibiting those portions of its demonstration containing information relating to the price of AFS's products and the company's credit and guarantee terms. The parties have agreed in oral argument before us that no issue as to the contents of the demonstration, as distinguished from the consummation of the transaction, was involved in the first action.

It is important at the outset to clarify which issues are not before us. Although AFS construes our decision in *American Future Systems I* as having established its constitutional free speech right to conduct demonstrations of a commercial product in common areas within the University's residence halls, we do not read that opinion so broadly. Penn State has not sought to bar all commercial activity from its residence halls. It has limited what ostensibly appears to be such a ban through its definition of "commercial" which excludes student contact with a peddler "if the contact was invited by the individual student involved." Therefore we need not decide whether a state University may properly ban all commercial activity in its residence halls. Similarly, AFS does not challenge the distinction which the earlier opinion made between an actual consummation or completion of the "commercial transaction" and a group demonstration of AFS's products. 618 F.2d at 258-59. Instead it seeks only to conduct the demonstration in the common areas without censorship of the contents of that demonstration.

Finally, although the University has conceded that portions of the demonstration may have some educational value, and it and the district court sought to draw the line between those portions of the demonstration which they deem educational and those portions which they deem commercial, it is unmistakable that the demon-

stration is geared to the sales of the products and represents commercial speech.[5] Thus the only issue is whether Penn State may censor the content of AFS's commercial speech conducted in the dormitory common rooms where AFS has been permitted by the University to conduct its sales demonstrations.

The principle that commercial speech is protected from unwarranted government interference by the First Amendment, as applied to the states through the Fourteenth Amendment, was established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). That protection extends to price information as well as advertising. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). Commercial speech, however, allows greater regulation than non-commercial speech, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980), the Supreme Court summarized the constitutional test for restrictions on commercial speech as follows:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest asserted and whether it is not more extensive than is necessary to serve that interest.

In *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 n.6 (3d Cir.), *cert. denied*, 102 S.Ct. 2240

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5. It may be wishful thinking to assume that most student guests attend the demonstrations for their educational value. Students are told in advance that those who attend are eligible to participate in the drawing of a winner of a four-day vacation in Florida. *See American Future Systems I*, 618 F.2d at 254.

(1982), we stated that advertisements may be regulated to insure their truthfulness and to prevent harm to the public. *See also Beneficial Corporation v. F.T.C.*, 542 F.2d 611, 619 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), ("the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation").

In the instant situation, there has been no allegation that AFS's commercial speech activities are fraudulent, misleading or otherwise unlawful. As the Supreme Court emphasized in *Central Hudson:*

> The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

447 U.S. at 564.

We, therefore, must first determine whether the University has advanced a substantial government interest to be achieved by the restrictions at issue. The only interest advanced by Penn State for precluding information on the price of the company's products and the nature of the contract it enters into with purchasers is that asserted in the prior action before this court — *i.e.* its interest in maintaining the proper study atmosphere in its dormitories and in protecting the privacy of the students residing in those facilities. Restrictions on the *contents* of the demonstration as distinguished from the conduct of the demonstration cannot further these interests. The Supreme Court cases provide ample precedent for the

proposition that price information has value. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 754; *Bates v. State Bar of Arizona*, 433 U.S. at 364. The University does not contend that the mere act of convening a group in the common areas of the residence halls is inimical to the study atmosphere since its policy permits such group activity. We conclude that Penn State has failed to show a substantial state interest, much less a plausible explanation, for its policy differentiating between the nature of the information contained in the AFS demonstration. We therefore reverse the summary judgment entered in Penn State's favor.

III.

STUDENT'S CLAIM

The claims of the students vary from that asserted by AFS. In January 1981, plaintiffs Wingert and Brubaker each informed the University that, with the consent of their roommates, they would be hosting a group demonstration of AFS products in their individual dormitory rooms. App. at 71a, 73a. Plaintiffs Del Valle, Varsics, Habecker, and Spillar were invited and planned to attend the group demonstrations. Penn State informed both Wingert and Brubaker that they would not be permitted to host such presentations in their dormitory rooms, but would be allowed to host the demonstration in a common room of the residence hall if the demonstration did not involve "a solicitation to purchase or a sale of any products." *Id.* at 72a, 74a. A common room was reserved by the University for each student's use. *Id.* The students joined this action, seeking relief permitting them "(1) to make purchases in a group setting, if they so desire, at a demonstration presented in a common room within the residence halls, and, in addition, (2) to host and participate in informational and sales demonstrations in a student's private dormitory

room, including the right to complete a sales contract at that time in the group setting or, at their option, to make a purchase at a later time in a private setting." Appellants' brief at 25.

The students' claim directed to the distinction which the University makes between the demonstration and consummation of the transaction in the common areas is one that was before this court in *American Future Systems I*. In granting summary judgment against the student plaintiffs, the district court recognized that they were not parties to *American Future Systems I* and are not bound by the doctrine of res judicata by the decision in that case. 522 F. Supp. at 551. Nonetheless, the court considered that our prior decision constitutes binding legal precedent insofar as the legal issues are concerned. We also are bound by the prior panel opinion. Internal Operating Procedures of the Third Circuit, Ch. VIII. C. (1980). Fairly read, the court in *American Future Systems I* sustained the validity of the distinction between the demonstration and the consummation of the transaction, and it did so after considering not only AFS's right to deliver the speech but the "students' rights to take part in the sales there." *See* 618 F.2d at 257 n.16. Therefore, the district court did not err in rejecting the students' claims with respect to the demonstration in the common areas.

The students also challenge the University restriction of the use to which they may put their dormitory rooms by preventing the group demonstrations. They invoke their rights to free speech, associational interests, privacy, due process, and section 504-A of the Pennsylvania Landlord Tenant Act. Each of these claims was rejected by the trial court in granting summary judgment for Penn State. We focus primarily on the students' claimed right of free speech and associational interests.

The students argue that they have established by affidavit that the primary reasons for desiring to participate in the AFS presentations were educational, social,

and cultural rather than commercial, that the district court failed to consider their noncommercial free speech rights, and that such rights deserve a higher level of protection than commercial speech. They claim that "the state must demonstrate a compelling state interest for the regulation" and that the regulation must be narrowly drawn. The Amicus American Civil Liberties Union argues that to the extent Penn State's regulations prohibit students from gathering in their own dormitory rooms to hear AFS's presentations, they violate the First Amendment because the "interest in protection of privacy and study atmosphere, whatever its sufficiency as grounds for the university's restrictions on use of the common rooms, does not meet constitutional requirements as a justification for prohibitions against students hearing commercial presentations in a student's own room." American Civil Liberties Union Brief at 8.

The district court does not appear to have considered the students' associational and free speech rights in the activities in their dormitory rooms independently from the activities conducted in the common areas. In its argument before us, Penn State represented that all organized group activity is prohibited in the dormitory rooms and must be conducted in the common areas, and that this policy applied to political as well as commercial activity. If this were the case, Penn State may indeed have a satisfactory reason for distinguishing between group activity in individual dormitory rooms and in common areas which can be observed by others. Such reasons may relate to the safety and well being of the students and the facility by which their security can be protected. The difficulty is that on this record we do not know whether there is a blanket prohibition against all organized group activity, and there have been no findings made by the district court as to the basis for such a prohibition.

It is undisputed that even speech entitled to the highest First Amendment protection may be subject to

reasonable time, place, and manner regulations that are content-neutral, serve a significant governmental interest, and that leave open ample alternative channels for communication of the information. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48 (1981). In this case the absence of any record on this issue and any findings by the district court makes this an inappropriate case for summary judgment. The University's reliance on the need to preserve a study atmosphere, asserted also in defense of this regulation, is unsupported by any evidence in this record and there is no basis to bind the students, who were not parties in the prior litigation, by any evidence which may be on record in that case. Therefore we will not speculate about the validity of the line drawn by the University between activity in the common areas of the dormitory and the dormitory rooms themselves.

As the district court found, plaintiffs' due process claim depends on finding some predicate right in the form of a liberty interest. Since the district court had rejected plaintiffs' proffered free speech right, it concluded there was no such liberty interest implicated. Since we have concluded that it was inappropriate to grant summary judgment against the student plaintiffs on this ground, it follows that the district court will need to reexamine the plaintiffs due process claim. At that time, plaintiffs may seek to amend the complaint to provide, if they can, the specificity which the district court found lacking.

Because we must remand this matter to the district court, we will also reach for its guidance the students' contention that the Penn State policies violate their constitutional right to privacy which encompasses their right to receive visitors in their dormitory rooms and to be received as a visitor in the privacy of a fellow student's room. We have previously commented that "the full measure of the constitutional protection of the right to privacy has not yet been delineated." *United States v.*

Westinghouse Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980). In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) the Supreme Court referred to two types of privacy interests: "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." The latter decisions have encompassed "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul v. Davis*, 424 U.S. 693, 713 (1976). An individual student's right to privacy is not abrogated because the student has chosen to live in a University dormitory. On the other hand, the intimate personal nature of the rights previously accorded privacy protection is a far cry from the right asserted here, the right to host and attend a demonstration of cookware. We are unwilling to extend the constitutional right of privacy to commercial transactions completely unrelated to fundamental personal rights and therefore affirm the district court's rejection of that basis of plaintiffs' claims.[6]

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6. The district court rejected the claim of Brubaker, Wingert, and Graves that Penn State's policies abridge their rights under §504-A of the Pennsylvania Landlord and Tenant Act, 68 P.S. §250.544. That section provides:

> The tenant shall have a right to invite to his apartment or dwelling unit such employees, business visitors, tradesmen, deliverymen, suppliers of goods and services, and the like as he wishes so long as his obligations as a tenant under this article are observed. The tenant also shall have right to invite to his apartment or dwelling unit, for a reasonable period of time, such social guest, family or visitors as he wishes so long as his obligations as a tenant under this article are observed. These rights may not be waived by any provisions of a written rental agreement and the landlord and/or owner may not charge any fee, service charge or additional rent to the tenant for exercising his rights under this act.
>
> It is the intent of this article to insure that the landlord may in no way restrict the tenant's right to purchase goods, services and the like from a source of the tenant's choosing and as a

For the foregoing reasons, we will reverse the grant of summary judgment for the defendants and will remand this matter to the district court for further proceedings consistent with this opinion.

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for the Third Circuit

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consequence any provision in a written agreement attempting to limit this right shall be void and unenforceable in the courts of this Commonwealth.

The parties disagree as to whether this statute applies to Penn State's dormitories and have referred us to no relevant Pennsylvania court decision construing this statute. Under these circumstances, and since the students' claims may be resolved on the basis of other federal issues, it is unnecessary at this time to reach this issue.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2674

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOAN D. VARSICS, DENNIS C. HABACHER, JOHN P. SPILLER, and KEVIN GRAVES,

Appellants

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD and M. LEE UPCRAFT,

Appellees

AMERICAN FUTURE SYSTEMS, INC., etc. et al.,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*

The petition for rehearing filed by appellees, The Pennsylvania State University, Board of Trustees of The Pennsylvania State University, John W. Oswald and M. Lee Upcraft, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: September 21, 1982

OPINION SUR PETITION FOR REHEARING

SLOVITER, *Circuit Judge*.

Under ordinary circumstances, the petition for rehearing and for rehearing in banc filed by appellees ("Penn State") which raises issues previously raised and rejected by an undivided panel of this court in its decision would not warrant any comment in conjunction with the order denying said petition. However, because five members of this court have joined in a statement which does not suggest that the panel's statement of the applicable law is incorrect, and have nonetheless voted for rehearing in banc notwithstanding our general policy to the contrary, *see* Internal Operating Procedures of the Third Circuit, Ch. VIII. B (1980), this may create some confusion when the case is remanded to the district court. Therefore a reiteration of the issues raised in the appeal, addressed in the opinion and decided by the court is called for.

The statement of Judge Adams that the opinion in this case may cause state universities to "lose a significant portion of their control over commercial activity on their campuses" overstates the issue, the record and the opinion in this case. Neither in *AFS I* nor *AFS II* was this court presented with the issue of the scope of a state uni-

versity's power to close its residence halls to all commercial activity.

The issue decided by the court in *AFS I* was the validity of the distinction made by Penn State between the group demonstration and the consummation of sales. All of the parties, including counsel for Penn State, agreed at oral argument before this court that the issue of Penn State's restriction on the content of the group demonstration had not been raised or decided in *AFS I*. In *AFS II*, the court was faced with that issue, the right of the University to review the material which AFS would present in the group demonstration and to prevent AFS from including material referring to price, guarantee and payment plans in its group demonstration. Since the restriction which Penn State has placed on AFS is a content-based restriction on the material that it may include in its group demonstration, Judge Adams' statement that "The primary restriction [placed on plaintiff] appears to be that sales may not be consummated in the common areas of a dormitory" is surprising. Furthermore, a content-based restriction can hardly be characterized as a "minimal limit".

The suggestion implicit in Judge Adams' statement that the opinion in *AFS II* may narrow the range of options open to a state university interested in resisting use of the school premises to promote sales of merchandise overlooks the significant fact that Penn State, for whatever reason, has not resisted such sales. The record and the opinion in this case show that Penn State permits group demonstrations in common areas and consummation of the commercial transaction in the individual students' rooms. The district court granted summary judgment for Penn State on the challenge by AFS to Penn State's actions in restricting the content of the group demonstrations in common areas and on the students' challenge to the prohibition of group demonstrations in their dormitory rooms. *AFS II* held the summary judgment as to the AFS claim could not be upheld because

Penn State had "failed to show a substantial state interest, much less a plausible explanation, for its policy differentiating between the nature of the information contained in the AFS demonstration." *American Future Systems, Inc. v. The Pennsylvania State University*, No. 81-2674, slip op. at 12 (3d Cir. August 9, 1982). It also held that there was no evidence in the record to justify the restriction with regard to the dormitory rooms because Penn State had not introduced any relevant evidence in this case in that regard. *Id.* at 15.

The opinion can hardly be considered to have enunciated either a new or disputed legal principle by requiring that a state university desirous of regulating commercial speech must show that such regulation furthers substantial state interests. In the most recent Supreme Court decision omitted from the series of cases referred to by Judge Adams, the Court cautioned that although a state may regulate commercial speech, "the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests." The Court stated that states retain the authority to regulate advertising that "is inherently misleading or that has proven to be misleading in practice" and to promulgate "carefully drawn restrictions" which further other substantial state interests. *In re R- M. J-*, 102 S.Ct. 929, 939 (1982). *See also Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 n.6 (3d Cir.), *cert. denied*, 102 S.Ct. 2240 (1982).

The decision in this case leaves open to Penn State the opportunity on remand to produce evidence to show a substantial state interest to support its policy. In light of the incomplete record in this case and the preliminary stage at which this issue reached the court, it would hardly promote judicial economy and efficiency to have in banc consideration of the abstract issue alluded to by Judge Adams with respect to a state university's power to resist commercial activity.

JUDGE ADAMS dissents from the denial of rehearing, and makes the following statement:

Prior to 1975, commercial speech had no sanctuary in the First Amendment. Then in *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court held that the First Amendment protected the right of a Virginia newspaper to run advertisements which announced that abortions were legal in New York and offered the services of a New York referral agency. The statute in question banned all publications that prompted the procuring of an abortion. The court emphasized the great public interest in the subject matter. A year later, in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court relied on *Bigelow* to hold that a Virginia statute that completely barred pharmacists from advertising the sale of prescription drugs was unconstitutional. A primary reason for this result was the Court's concern that "the poor, the sick, and the aged" might be substantially disadvantaged by this law. The lack of important information regarding needed medication could seriously limit their "enjoyment of basic necessities [of life]." 425 U.S. at 763-64.

The Supreme Court's next decision in this area was *Bates v. State Bar*, 433 U.S. 330 (1977), which struck down an Arizona Supreme Court rule which completely prohibited *any* advertising by a lawyer. One of the essential predicates of the *Bates* decision was that many citizens in Arizona and elsewhere were not obtaining legal assistance even when they needed counsel because of their fears regarding the price of such advice or because of their inability to locate a competent attorney.

In *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), the court ruled that a state may forbid in-person solicitation of prospective clients by lawyers for pecuniary gain, and noted the distinction between commercial and noncommercial speech. Speaking for the Court, Justice Blackmun said:

> We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Virginia Pharmacy*. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commerical speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial [expression].

In our case, a governmental unit, here a state university, has not barred completely any advertising regarding plaintiff's products. Nothing prevents the plaintiff from communicating price information by placing signs on the school's bulletin boards or mailing circulars to the students, or even coming on the premises and presenting their merchandise to the students. The primary restriction seems to be that sales may not be consummated in the common areas of a dormitory. Penn State apparently has attempted to implement this restriction by placing minimal limits on the format of the group demonstration. No one has shown the great need for permitting sales of merchandise to be conducted in this manner.

I have a serious question whether a reasonable reading of *Bigelow*, *Virginia Pharmacy*, *Bates*, and *Ohralik* can yield a conclusion that a state university is *constitutionally* limited to a narrow range of options in regulating third parties permitted on school premises to promote sales of merchandise. I believe this matter should be addressed by the entire Court and the subject

carefully considered before signals are sent to state universities indicating that they may well lose a significant portion of their control over commercial activity on their campuses.

I am concerned that, unless the courts are prepared to step back and take a careful review of the precedents, the extension of a juridical concept by a dry and remorseless logic can carry us to a position never contemplated by the Supreme Court when this doctrine was first propounded. Moreover, it is a position totally incompatible with our societal concerns.[1]

Judges Aldisert, Hunter, Weis and Garth join in this statement.

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for the Third Circuit

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1. As the Chief Justice has reminded us: " 'All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded. . . .' " *United States v. 12 200-Ft Reels of Super 8 Mm. Film*, 413 U.S. 123 (1973), *quoting Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (Holmes, J.).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 83-3412

AMERICAN FUTURE SYSTEMS, INC. BRUBAKER, STEVEN WINGERT, RICHARD J. DEL VALLE, W. BRUCE VARSICS, JOAN D. HABACHER, DENNIS C. and SPILLER, JOHN B. JOHNSON, KATHY GRAVES, KEVIN

vs.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY OSWALD, JOHN W., indiv dually and as President of the Pennsylvania State University, UPCRAFT, M. LEE, Indiv dually and as Director of Residential Life Programs of the Pennsylvania State University, Appellants

(D.C. Civil No. 81-0171)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA - Scranton

Present: ADAMS and BECKER, Circuit Judges and SAROKIN, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District

Court for the Middle District of Pennsylvania - Scranton and was argued by counsel April 23, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 5, 1983, be, and the same is hereby reversed and the cause remanded to the said District Court which is instructed to enter judgment on the merits for Penn State. Costs taxed against appellees.

ATTEST:

/s/ Sally Mrvos
Clerk

December 28, 1984

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* Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, sitting by designation.

UNITED STATED COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-3412

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOHN D. VARSICS, DENNIS C. HABACHER, JOHN B. SPILLER, KATHY JOHNSON, KEVIN GRAVES,

Appellees

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, et al.

Appellants

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and SAROKIN, District Judge

The petition for rehearing filed by Appellees

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied. Judge Hunter would grant rehearing.

By the Court,

/s/ Edward R. Becker
Judge

Dated: Feb 6 1985

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* As to panel rehearing only.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	Civil No. 81-0171
Plaintiffs	:	Complaint Filed
vs.	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	Civil No. 81-0171
Plaintiffs	:	Complaint Filed 2/5/81
vs.	:	Remanded 10/1/82
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

OPINION

MUIR, District Judge.

I. Introduction.

Plaintiffs, American Future Systems, Inc., Steven Brubaker, Richard J. Wingert, W. Bruce Del Valle, Joan D. Varsics, Dennis C. Habecker, John B. Spillar and Kevin Graves, filed this action alleging violations of their constitutional rights and of rights granted by Pennsylvania law on February 5, 1981. Also on February 5, 1981, Plaintiffs filed a motion for a preliminary injunction which was denied by this Court in American Future Systems vs. Pennsylvania State University, 510 F.Supp.

983 (M.D. Pa. 1981). On July 17, 1981, Defendants, Pennsylvania State University, the Board of Trustees of the Pennsylvania State University, John W. Oswald and M. Lee Upcraft, filed a motion for summary judgment. By opinion and order of September 16, 1981, this Court granted the Defendants' motion for summary judgment. American Future Systems vs. Pennsylvania State University, 522 F.Supp. 544 (M.D. Pa. 1981). On August 9, 1982, the Court of Appeals reversed this Court's grant of summary judgment, American Future Systems vs. Pennsylvania State University, 688 F.2d 907 (3d Cir. 1982), and remanded the case to this Court for further proceedings. On September 21, 1982, the Court of Appeals issued an opinion Sur Petition for Rehearing. American Future Systems vs. Pennsylvania State University, 688 F.2d 916 (3d Cir. 1982).

On October 18, 1982, Plaintiffs filed a motion for a preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure and a supporting brief. By order of October 21, 1982, this matter was placed on the Court's December 1982 list for trial and by order of

November 10, 1982, the Court scheduled the hearing in this case to commence on a day certain, Thursday, December 2, 1982, a most unusual event because of this Court's normal adherence to trailing dockets.

On November 29, 1982, at the pre-trial conference, Plaintiffs filed a concurred in request to amend the complaint and consistent therewith to amend the motion for a preliminary injunction. By order of December 2, 1982, the foregoing motions were granted.

The hearing on the Plaintiffs' motion for a preliminary injunction commenced at 11:00 A.M. on Thursday, December 2, 1982 and concluded at approximately 7:15 P.M. on Saturday, December 4, 1982. On December 9, 1982, Plaintiffs petitioned the Court for leave to present additional relevant information to the Court and for leave to file supplemental findings of fact. The petitions were opposed on December 17, 1982. The motion for leave to present additional relevant information relates to certain events which occurred subsequent to the close of the trial. First, the proposed additional relevant information relates to AFS's activities.

Since AFS does not request injunctive relief in its own behalf, such evidence is not relevant to the present matter. Second, the additional information, since it is not subject to cross examination, may not properly be considered to be "evidence" in this proceeding. The motion to present additional relevant information will be denied. The Plaintiffs' request for leave to file supplemental findings of fact will be granted although the supplemental proposed findings should have been presented in handwritten form by the close of the hearing. Also on December 9, 1982, the Plaintiffs presented a form of proposed injunction order which grants no relief to the corporate Plaintiff, A.F.S..

Following are the Court's findings of fact, discussion, conclusions of law, and order.

II. Findings of Fact.

1. The original Plaintiffs were American Future Systems, Inc. ("AFS"), Steven Brubaker, Richard J. Wingert, W. Bruce Del Valle, Joan D. Varsics, Dennis

C. Habecker, John B. Spillar and Kevin Graves. (U)

2. Plaintiffs AFS is a corporation incorporated under laws of the Commonwealth of Pennsylvania and having its principal place of business at 715 Lancaster Avenue, Bryn Mawr, Pennsylvania, 19019. (U)

3. Edward M. Satell is the President of AFS. (U)

4. AFS is a private enterprise engaged in the business of retail sales of table china, tableware, crystal, and cookware through the presentation of group demonstrations of its merchandise to students at colleges and universities throughout the United States.

5. Plaintiff Kevin Graves is a student enrolled at the Pennsylvania State University ("Penn State" or "University") who resides at 12 Jordan Hall which is a dormitory room in a University residence hall.

6. Richard J. Wingert is not a student at Penn State.

7. Joan D. Varsics is not a student at Penn State.

8. Dennis C. Habecker is not a student at Penn State.

9. John B. Spillar is not a student at Penn State and is no longer a Plaintiff in this litigation.

10. W. Bruce Del Valle is not a student at Penn State.

11. Defendants are Penn State, the Board of Trustees of Penn State ("Board of Trustees"), John W. Oswald and M. Lee Upcraft. (U)

12. Defendant Penn State is an institution of higher education established in 1855 by Act of the Pennsylvania Legislature as a corporation for educational purposes and operates under a charter consisting of various legislative acts supplemented by decrees of the Court of Common Pleas of Centre County, Pennsylvania.

13. The main campus of Penn State is located at University Park, Centre County, Pennsylvania, and the University maintains 21 other campuses situated in locations throughout the Commonwealth of Pennsylvania. (U)

14. Defendant Board of Trustees is the corporate body established by the

charter of Penn State with ultimate control and responsibility for the management and government of the University. (U)

15. The Board of Trustees consists of 32 members, ten of whom are public officials of the Commonwealth of Pennsylvania. (U)

16. Defendant John W. Oswald is an individual residing at 639 Kennard Road, State College, Pennsylvania. (U)

17. Oswald is President and Chief Administrative Officer of Defendant University and has final authority, subject to revisions and orders by Defendant, Board of Trustees, to establish and implement policy concerning student affairs. (U)

18. Defendant M. Lee Upcraft is an individual residing at 188 Le Nor Drive, State College, Pennsylvania. (U)

19. Upcraft is Director of Residential Life Programs of Defendant University and is responsible for development, effectuation, and enforcement of policy concerning the residence halls of the University. (U)

20. Penn State owns and operates over 40 residence halls containing approximately 6900 rooms at its University Park Campus for approximately 12,050 students. (U)

21. The rooms in the residence halls generally are used by two or more students for sleeping, dressing, studying and socializing.

22. The students use common facilities for lavatories, study lounges, laundry, storage and organized educational and social functions. (U)

23. At the beginning of the fall academic term, there are more students residing in the residence halls than can be accommodated in regular student rooms. At that time, typically five hundred to six hundred students live in the study lounges in the residence halls throughout the campus.

24. Virtually all of the study lounges within the residence halls are occupied and used as residential living units at the beginning of the fall term.

25. During the course of the fall term and winter academic term, as regular

rooms become available, students are moved from the study lounges.

26. Penn State's purpose in maintaining residence halls for students involves more than simply providing sleeping quarters for its students. Through programs and services provided to residence hall students, Penn State's goal is to enhance the students' academic experience and assist in the personal growth and development of the students.

27. Penn State conducts programs within the residence halls intended to assist students in dealing with personal problems and interests, including such matters as Alcohol Awareness, Diet and Nutrition, and Rape Prevention.

28. Penn State provides trained counselors, who are available to residence halls students for advice and counseling with respect to personal problems, academic matters and financial poblems.

29. Penn State also provides formal and informal social and recreational activities for students in the residence halls. (U)

30. Arthur Constantino is the Associate Director of Residential Life

Programs and is responsible, among other duties, for day-to-day supervision and administration of the programs and staff of the Residential Life Program. (U)

31. Within each residence hall building, rooms are organized on the basis of floors or parts of floors into units called a "house." The house serves as the basic residential living, social and educational unit for the students living in those rooms. (U)

32. Each house is assigned a "resident assistant" ("RA") who is a student living in that house. The RA is a member of the staff of the Office of Residential Life Programs of the University, and as compensation for these duties receives a credit for room and board charges and half of the tuition charges. (U)

33. In order to permit all of the activities which are ongoing in a residence hall to proceed in an orderly fashion, and to protect privacy and a study atmosphere, Penn State has adopted a set of regulations and procedures which control the use of the residence halls.

34. These regulations deal with (1) the establishment of "quiet hours" for study, (2) visitation within the residence halls, (3) canvassing within the residence halls, (4) fund raising by student organizations, (5) charitable solicitation by student organizations and (6) solicitation of money and sales of products and services in the residence halls.

35. Quiet hour restrictions require that all noise levels in rooms and hallways be reduced to an absolute minimum.

36. Certain areas within residence halls have predetermined quiet hour periods, while quiet hours within other areas of the residence halls are determined by a vote of the residents. The typical quiet hour period established by the vote of the residents is 7:00 p.m. to 7:00 a.m.

37. Visitors of the opposite sex must be escorted by the student resident to and from the student's room.

38. Visitors of the same sex can enter a residence hall upon an invitation from a resident.

39. On November 19, 1982, Penn State Adopted a new policy as follows:

REGULATIONS FOR THE SOLICITATION OF MONEY OR THE SALE OR SOLICITATION OF SALE OF PRODUCTS OR SERVICES IN UNIVERSITY RESIDENCE HALLS

1. Definitions.

(a) A residence hall is a University-owned building which contains rooms assigned to students for sleeping, dressing, studying and socializing, and which also contains common facilities and areas used by all students assigned to such residence halls, including common means of ingress and egress, common lavatories, common study lounges, common storage areas and areas used in common for organized educational and social functions.

(b) The solicitation of a sale of products or services shall include (1) any attempt to organize a meeting in a residence hall for the purpose of a demonstration or explanation of products or services which are for sale and (2) any demonstration, explanation or distribution of literature in a residence hall concerning products or services which are for sale.

2. Except as hereinafter provided, no person (including a student), firm, business entity, charitable organization, religious organization or other organization may

solicit money or sell or solicit the sale of any product or service anywhere in a residence hall.

3. A student assigned to a room in a residence hall may invite a person, firm, business entity, charitable organization, religious organization or other organization to that students assigned room to solicit money or to sell or to solicit the sale of products or services with that student only. Such solicitation or sale must occur only in the assigned room of the student-invitor. The soliciation of money or the sale or the solicitation of a sale of products or services to any other student is prohibited anywhere in the residence hall.

4. Registered student organizations and residence hall house governments may solicit money or solicit the sale of products or services in a residence hall in accordance with the regulations governing Student Organizations at Paragraph B., Funding and Financial Affairs of Registered Student Organizations, subparagraph 3, Fund Raising on Campus and subparagraph 4, Solicitation on Campus.

5. Nothing in these regulations shall be deemed to preclude any solicitation or sale by mail, telephone or other communication media. (U)

40. Subparagraph 3, above, of the November 19, 1982 policy did not constitute a change in policy.

41. The new regulation of the solicitation of money and sale of products and services is different from the prior policy regulating commercial activities in only one material respect. Under the new regulations a vendor of products and services may not conduct a group demonstration, explanation, or distribution of literature concerning products or services which are for sale anywhere in a residence hall. Under the old policy a vendor could conduct such a group demonstration in a common area provided there was no solicitation to sell the product or service in that area.

42. A student may invite a vendor to that student's room to conduct a transaction with that student.

43. A vendor may solicit a sale or an invitation to a student's room by telephone. Students' telephone numbers are posted in the lobby of each residence hall.

44. A vendor may use the mail to solicit a sale or an invitation to a student's room.

45. Vendors are permitted to advertise in the campus newspaper and on the campus radio station.

46. The housing and food service contract signed by all students states as follows: "The conducting of any business enterprise for personal profit is prohibited in and around the University-operated units."

47. Residence halls are reserved for the use of the residents and their properly invited guests.

48. Under Penn State rules members of the general public are not permitted to enter the residence halls uninvited except that they may enter the lobby area to examine the list of telephone numbers of students and to call the students on the telephone.

49. A "no trespassing" sign is posted at or near the entrance of each residence hall on the Penn State Campus.

50. The sales activities of AFS which are relevant to this case relate to attempted sales of a selected number of

patterns of china, crystal, silverware and cookware known as collectively as the "American Prestige Series."

51. AFS does not engage in door-to-door solicitations within the residence halls.

52. American Prestige Series goods are generally sold at demonstrations or shows attended by a student resident who acts as hostess, an AFS sales representative and a number of invited guests.

53. With respect to its sales to college students, AFS seeks out a particular college student by telephone and asks her if she would serve as hostess for an American Prestige Series show on campus.

54. This communication is performed either through AFS's central "booking" office in Bryn Mawr, Pennsylvania or through AFS's sales representative assigned to a given geographic area.

55. At the time of the initial telephone contact, a student hostess is informed that, if she serves as a hostess for the show, she will receive a holiday in Florida or Las Vegas.

56. Before the scheduled show, a student agreeing to serve as hostess for such a demonstration receives a packet of information containing a number of invitations for guests and a description of what is involved at the show.

57. The student who has agreed to serve as hostess for a demonstration is asked to distribute invitations to other students.

58. It is AFS's policy to attempt to have ten to 15 students in attendance at a sales demonstration. That number does not include men or women who have been to a prior AFS sales demonstration.

59. AFS instructs its representatives to comply with all safety, occupancy and visitation requirements within residence halls.

60. A sales demonstraton put on by AFS generally proceeds in two parts: A demonstration of the American Prestige Series products including a comparison of those products with other merchandise and an explanation of why American Prestige products are superior to the other products and a sales portion where students are given an opportunity to

purchase products on an installment plan basis.

61. AFS's representatives are directed to follow a "cue card" format as set forth in Trial Exhibit P]

62. AFS provides some consumer information in connection with its sales demonstrations with a view toward selling its products.

63. If a student decides to purchase American Prestige Series merchandise after attending an AFS presentation, the student is requested to sign a sales contract at that time. The price of a "package" of merchandise is in the approximate range of $300.00 to $800.00.

64. Generally, between ten and 20 percent of those students attending AFS sales presentations purchase merchandise.

65. An AFS sales contract contains a "code" at the bottom which consists of a number of letters. These letters and the explanation of them as set forth in the AFS manual are as follows:

> "The codes are divided into four main categories. Each contract must be marked with four codes, one from each category. The codes are as follows:

Category I -- Codes Describing Educational Institution

"R" -- four-year college
"J" -- junior college
"N" -- nursing school
"V" -- vocational school

Category II -- Codes of Race and National Origin

"G" -- White
"M" -- Black
"O" -- Oriental
"X" -- Mexican or Spanish

Category III - Codes of

"C" -- married
"S" -- not married

Category IV -- Codes of Residence

"D" -- dorm
"A" -- apartment
"P" -- with parents"

66. The classifications are used at least in part to determine which credit policy will be applied to a student purchasing AFS merchandise.

67. If a designated class of college students has a satisfactory payment record, each student within that class is eligible to have merchandise shipped before the first payment is due without meeting the AFS creditable test.

68. If a designated class of college students does not have a satisfactory payment record, a student within that class does not receive delivery of the goods until that student has established a satisfactory payment history.

69. Individuals within the class of white and oriental students in their sophomore year or later who attend a four year college or a nursing school are eligible for immediate delivery of AFS merchandise.

70. Individuals within the following classes are eligible only for deferred shipment of AFS merchandise: (a) all freshmen students; (b) all junior college students; (c) all vocational college students.

71. With respect to Black, Mexican or Hispanic students attending four year colleges and nursing schools, the credit policy states that a reasonable effort should be made to have the sale made on a deferred shipment basis. However, a sales representative may offer such individuals immediate shipment if the sales representative deems it appropriate to do so under the particular cirumstances.

72. The Florida vacation certificate includes only lodging in a hotel for a period of two nights and three days and does not include transportation or meals.

73. Amy Cervi is a student at Penn State residing within the residence halls, at room 355, McElwain Hall. Miss Cervi has two roommates who also reside in Room 355.

74. At sometime during the week of September 19, 1982, Miss Cervi received a telephone call from a representative of American Future Systems, Inc.

75. The AFS representative asked Miss Cervi to serve as a hostess for an AFS sales demonstration in her room and invite nine of her friends to attend.

76. The AFS representative told Miss Cervi that she would receive a free Florida vacation for serving as hostess for the AFS demonstration.

77. The AFS representative did not disclose to Miss Cervi that the vacation certificate was only for two nights and three days' lodging or that transportation and meals were not included.

78. The AFS representative persuaded Miss Cervi to serve as a hostess for an

AFS demonstration in her room and scheduled the demonstration for September 29, 1982.

79. AFS or its representatives scheduled 51 group presentations in Penn State's residence halls for the last two weeks of September, 1977.

80. Penn State students have been denied permission to invite AFS to conduct group demonstrations in the privacy of an individual's dormitory room despite the fact that that individual invited an AFS representative and other guest of that individual's choosing to his or her dormitory room for the specific purpose of participating in and attending the AFS presentation. (U)

81. Penn State does not permit the solicitation of money or the solicitation and sale of products and services by any person, including students, to groups of students anywhere in the residence halls.

82. As justification for its policy, Penn State claims the following: (a) such activity could invade the privacy of students; (b) such activity could disrupt students while studying or sleeping; (c) such activity could disrupt the

educational and personal developmental programs of the Office of Residential Life Programs; (d) such activity could disrupt the activities of student government; (e) such activity could disrupt organized and informal social and recreational activities of students; (f) to the extent that these disruptions would occur, they would be for a purpose unrelated to the purposes to which the residence halls are dedicated; (g) the greater the frequency of the solicitation of money and sale of products and services, the more likely that such disruptions and invasions of privacy would occur; (h) such activity could displace some of the normal activities carried on in a residence hall if a student chose not to challenge the activity (i.e., students might choose not to object to a vendor in their room or in a study lounge where they wished to study, simply to avoid a possible confrontation with the vendor and other students); (i) such activity would require Penn State to exercise controls on the activity which could divert resources and efforts from the purposes to which they are now used; (j) group solicitations are incompatible

with the uses to which the residence halls are dedicated; (k) the group solicitation and sale of products and services has the potential for deception, fraud and overreaching.

83. The real concern of Defendants has to do with monitoring the "high pressure salesmanship" of employees of AFS.

84. Penn State's policy allows one-on-one solicitation while prohibiting group presentations for solicitation.

85. There is no practical distinction between the one-on-one presentation as opposed to the group presentation in terms of safety, security, and other purported state interests.

86. The potential for an AFS sales demonstration to disturb a quiet study atmosphere in the residence halls is substantially less than the potential to cause such disturbance of activities currently permitted by Penn State and engaged in by students with some frequency.

87. Loud, boisterous and disturbing activities which occur in the residence halls include "keg parties," water fights,

bull or rap sessions, "surf's up", birthday parties in the showers, "pennying in" occupants of a dormitory room and loud noise levels of stereos.

III. Discussion.

This is the second case before the Court involving AFS's challenge of Penn State's policies relating to commercial activities in its dormitories. In the first lawsuit, judgment was granted in favor of Penn State upholding its regulations against an attack that they violated AFS's First Amendment rights. American Future Systems, Inc. vs. Pennsylvania State University, 464 F.Supp. 1252 (M.D. Pa. 1979), aff'd 618 F.2d 252 (3d Cir. 1980) (American Future Systems I).

AFS is a corporation whose principal business is the sale of cookware, china, crystal, and silverware through demonstrations of its merchandise at colleges throughout the United States. In its original complaint in this lawsuit, AFS sought at the invitation of individual students, to be permitted to present sales demonstrations in common areas within Penn

State's residence halls, to disseminate commercial information to groups of students through sales demonstrations in individual dormitory rooms, and to consummate sales to students in the residence hall.

During the pendency of the American Future Systems I litigation, and at the beginning of this lawsuit, Penn State's policy was such that:

> (1) AFS may conduct group demonstrations in specified common areas of each residence hall; (2) following those demonstrations a student may invite an AFS representative to the student's room to purchase AFS goods; (3) AFS is free to solicit invitations to individual students' rooms at the group demonstrations or by telephone or mail; (4) AFS is not permitted to conduct group demonstrations in an individual student's dormitory room; (5) AFS is not permitted to consummate sales in individual dormitory rooms to a purchaser other than the occupant of the room; (6) AFS is not permitted to conduct group solicitations of sales in the common areas of residence halls; and (7) AFS is not permitted to consummate commercial transactions in the common areas of residence halls.

American Future Systems vs. Pennsylvania State University, 522 F.Supp. 544, 547

(M.D. Pa. 1981), citing American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983, 985 (M.D. Pa. 1981) (American Future Systems II).

After the Court of Appeals issued its opinion in American Future Systems II reversing this Court's grant of summary judgment, American Future Systems, Inc. vs. Pennsylvania State University, 688 F.2d 907 (3d Cir. 1982), the Court of Appeals decided the case of International Society for Krishna Consciousness, Inc. vs. New Jersey Sports and Exposition Authority, 691 F.2d 155 (3d Cir. 1982) (Krishna). In Krishna, the Court of Appeals addressed the question whether the International Society for Krishna Consciousness, a religious group, was entitled to distribute literature and solicit donations in the Meadowlands Sports Complex in New Jersey (Meadlowlands). The central issue in Krishna was whether or not the Meadlowlands was a "public forum." After reviewing a line of Supreme Court cases, the Court of Appeals concluded that the Meadowlands was not a "public forum." Krishna, 691 F.2d at 161. Finding the

policy at the Meadowlands precluding distribution of literature and solicitation of donations to be a "reasonable" restriction based on substantial state interests, the Court of Appeals upheld the policy. Krishna, 691 F.2d at 163.

After learning of the Krishna decision, Penn State concluded that its dormitories were also not "public forums" for First Amendment purposes. See also American Future Systems I, 618 F.2d 252, 256 (3d Cir. 1980) ("We believe that these facts demonstrate that the area at issue here, the residence halls at Penn State, does not constitute a 'public forum' under the First Amendment."). Consistent with this view that its dormitories are not "public forums," on November 19, 1982, and on the eve of this Court's hearing on Plaintiffs' motion for a preliminary injunction, Penn State issued new regulations which prohibited all commercial solicitation activities in the "common areas" of its residence halls. See Regulations for the Solicitation of Money or the Sale or Solicitation of Sale of Products or Services in University

Residence Halls, promulgated November 19 1982, (hereinafter "Dormitory Solicitation Regulations" or "Regulations") at ¶¶1, 2.

While all "common area" commercial activities are effectively prohibited by Penn State's Dormitory Solicitation Regulations, the Regulations do not change Penn State's former policy regarding commercial activities in an individual student's room. Compare Dormitory Solicitation Regulations at ¶3 with American Future Systems II, 552 F.Supp. 544, 547 (M.D. Pa. 1981). Thus, with regard to individual student rooms, Penn State's policies permit a student assigned to a room to invite a representative of a business to that student's room to demonstrate and sell commercial products to that student only. Group demonstrations and sales in an individual student's room are prohibited.

As a result of the promulgation of Penn State's new Dormitory Solicitation Regulations, AFS and the student Plaintiffs have determined not to litigate "common rooms" issue in this case. See Petition of Plaintiffs for Leave to Amend or Supplement Complaint and Motion for

Preliminary Injunction, Doc. No. 150, filed November 29, 1982, and Orders granting Petition, Doc. Nos. 175, 176, filed December 2, 1982. Presently, the sole issue in this litigation is whether or not Penn State's Dormitory Solicitation Regulations with respect to limitation of commercial activities in individual students' dormitory rooms violate the Plaintiffs' constitutional rights. The Plaintiffs have challenged the procedured by which Penn State's November 19, 1982 Dormitory solicitation Regulations were promulgated. In particular, the Plaintiffs urged at the preliminary injunction hearing that the Regulations be stricken because there was no opportunity for students to participate in the drafting of the Regulations. Because the particular sections of the Regulations now at issue are not different from the prior regulations, and because there was no challenge to the process of promulgation of the prior regulations, this argument of the Plaintiffs may summarily be rejected.

Presently before the Court is the motion of the Plaintiffs for a preliminary injunction pursuant to Rule 65(a) of the

Federal Rules of Civil Procedure, filed October 18, 1982, and amended December 2, 1982, requesting that the Defendants be enjoined from enforcing the Dormitory Solicitation Regulation with respect to commercial activities within individual students' dormitory rooms. It is the position of the Plaintiffs that under the rulings of the Court of Appeals in American Future Systems I, 618 F.2d 252 (3d Cir. 1980) and American Future Systems II, 688 F.2d 907 (3d Cir. 1982), they are entitled to the declaratory judgment and other relief sought in the complaint. It is not appropriate at this time for the Court to determine if the Plaintiffs are correct. At this juncture, it is only proper for the Court to determine whether or not Plaintiffs have satisfied the requirements for the issuance of a preliminary injunction granting the relief sought in the complaint.

The standards for a preliminary injunction that maintains the status quo are set forth in Continental Group, Inc. vs. Amoco Chemical Corp., 614 F.2d 351, 356-57 (3d Cir. 1980), as follows:

> To support a preliminary injunction, the moving party must demonstrate that irreparable injury will occur if relief is not granted to maintain the status quo until a final adjudication on the merits can be made and that there is a reasonable probability of eventual success on the merits. In addition, the Court must weigh the possibility of harm to the nonmoving party as well as to any other interested persons and, when relevant, harm to the public. (Footnotes omitted).

See Delaware River Port Authority vs. Transamerican Trailer Transport, Inc., 501 F.2d 917, 919-920 (3d Cir. 1974); 11 Wright & Miller, Federal Practice and Procedure: Civil §2943 (1980). In this case the Plaintiffs seek not to maintain the status quo, but rather to alter the status quo to permit individual student Plaintiffs to invite AFS and other commercial solicitors to conduct group demonstrations and sales of merchandise in individual student rooms. In a situation in which a litigant seeks a preliminary injunction that alters the status quo pending final judgment, "the burden on the moving party is particularly heavy." Punnett vs. Carter, 621 F.2d 578, 582 (3d Cir. 1980), citing United States vs.

Spectro Foods Co., 544 F.2d 1175, 1181 (3d Cir. 1976). In essence, the equities must weigh decidedly in Plaintiffs' favor. Schlesinger vs. Carlson, 489 F.Supp. 612, 619 (M.D. Pa. 1980). See American Future Systems I, 510 F.Supp. 983, 985 (M.D. Pa. 1981).

A. Irreparable and Immediate Harm.

To support the grant of preliminary injunctive relief, the moving party must show that irreparable harm will occur if preliminary relief is denied. E.g., Continental Group, Inc. vs. Amoco Chemical Corp., 614 F.2d 351, 356-57 (3d Cir. 1980). "The danger of irreparable injury to the plaintiffs which we must evaluate is that harm which might ensue during the pendency of the litigation if we deny a preliminary injunction now but later decide on a fuller record that permanent relief is appropriate." Local No. 1 vs. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 419 F.Supp. 263, 287 (E.D. Pa. 1976) (emphasis in original), citing O. Fiss, Injunctions 168 (1972).

1. AFS's rights.

AFS's rights in this litigation are concededly derivative. In essence, AFS's rights exist only if the individual student Plaintiffs have and exercise the right to invite AFS into their dormitory rooms to conduct commercial activities. Thus, injury to AFS alone from being denied the ability to consummate business transactions will not be sufficient to justify issuance of a preliminary injunction. Indeed, it appears that AFS takes the position in this litigation, at least with respect to the present motion for a preliminary injunction, that the rights of the individual students, and not those of AFS are primarily of the Court's concern. See Plaintiffs' Trial Brief, Doc. No. 152, filed November 29, 1982; Plaintiffs' Proposed Preliminary Injunction Order.

It is also questionable whether AFS could show the requisite "irreparable harm." To the extent that AFS has suffered compensable financial loss, AFS may be made whole by payment of damages and is not "irreparably" injured. E.g., Oburn vs. Shapp, 521 F.2d 142 (3d

Cir. 1975); Supermarket Films, Inc. vs. Sylvania Electric Products, Inc., 321 F.Supp. 855 (W.D. Pa. 1971). See also United States v. American Friends Service Committee, 419 U.S. 7 (1974) (irreparable injury is a prerequisite to traditional equity jurisdiction to grant injunctive relief.) AFS also asserts that its constitutional rights have been and are being violated. In particular, AFS argues that the Court of Appeals' decision in American Future Systems II, 688 F.2d 907, 910-913 (3d Cir. 1982) recognizes that AFS's constitutional rights are violated by Penn State's regulations regarding commercial activities in the dormitories. A close reading of the decision of the Court of Appeals reveals that only the question whether AFS had the consitutional right to present its materials in the "common areas" of Penn State's residence halls was addressed. "[T]he only issue is whether Penn State may censor the content of AFS's commercial speech conducted in the dormitory common rooms where AFS has been permitted by the University to conduct its sales demonstrations." American Future Systems II, 688 F.2d at

912 (emphasis added). As a result of the amendment of the complaint in this case, the "common rooms" issue is no longer involved in this litigation. Even with respect to the "student rooms" issue, AFS contends that its constitutional rights are implicated. Quite clearly, under the Dormitory Solicitation Regulations AFS is entitled to present the entirety of its presentation within the confines of a student's room. Thus, the content of AFS's speech in a student's room is not limited. The only potential constitutional "right" which AFS might have in the context of its presentation in a student's room would relate to the "right" to have a certain audience, namely both the student "hostess" and the persons whom she invites, present for AFS's presentation. The Court seriously questions whether this is a "right" of AFS at all.

2. The Student Plaintiffs' Rights.

The student Plaintiffs residing in the residence halls contend they have the constitutional right to serve as host or hostess for and participate in informational and sales

demonstrations in their private dormitory rooms, including the right to complete a sales contract at that time in a group setting. With respect to the restrictions Penn State's Dormitory Solicitation Regulations place on the use to which the students may put their dormitory rooms, the students invoke their free speech, associational, privacy, and due process rights as well as certain claimed rights under Section 504-A of the Pennsylvania Landlord Tenant Act, 68 P.S. §250.554.

The students' claim of interference with their privacy rights was expressly rejected by the Court of Appeals in American Future Systems II. Therein, the Court of Appeals stated that it was "unwilling to extend the constitutional right of privacy to commercial transactions [in students' dormitory rooms] completely unrelated to fundamental personal rights..." 688 F.2d at 915-16. Furthermore, Penn State's Dormitory Solicitation Regulations expressly permit AFS to give its presentation, in entirety, to a student in his or her dormitory room on a one-on-one basis. This rule effectively grants to all students the

privilege of hearing AFS's presentation. Thus, to the extent the students claim their right merely to listen to AFS's presentations is being limited, the Court does not find the students to be injured "irreparably."

The Court must, nonetheless, determine whether the students' First Amendment speech and associational rights are otherwise likely violated by the Penn State Dormitory Solicitation Regulations and, if so, whether the students suffer irreparable injury. It is likely that the free flow of ideas resulting from attendance at group commercial demonstrations and solicitations is protected by the First Amendment. The right to serve as host or hostess for such demonstrations is also likely protected.

The concept of irreparable injury is closely related to adequacy of a remedy at law. E.g. Oburn vs. Shapp, 521 F.2d 142 (3d Cir. 1975); Danielson vs. Local 275, 479 F.2d 1033 (2d Cir. 1973). Given the intangible nature of a constitutional right, it is often said that such a right is not capable of remedy in damages. E.g. Sambo's of Ohio, Inc.

vs. City Council of Toledo, 466 F.Supp. 177, 181 (N.D. Ohio 1979), citing Basista vs. Weir, 340 F.2d 74 (3d Cir. 1965). This is especially the case where the violation of the constitutional right does not cause actual monetary damages. Unlike AFS, the student Plaintiffs probably cannot claim any financial injury resulting from Penn State's policies. Furthermore, the amount of time a student spends in a residence hall is limited. Indeed, many of the original student Plaintiffs, having graduated from Penn State or moved from its residence halls, probably have no remedy at all. Thus, given that delay in granting relief might well decrease the quality of the relief or render it effective entirely, the student Plaintiffs cannot wait for a full hearing on the merits in this case. For all of these reasons, this Court is convinced that the harm to the student Plaintiffs is sufficiently immediate and irreparable in nature that injunctive relief is proper.

B. Likelihood of Success on the Merits.

An essential element of the student Plainitffs' request for a preliminary

injunction is that they demonstrate a "reasonble probability of eventual success on the merits." Continental Group, Inc. vs. Amoco Chemical Corp., 614 F.2d 351, 356-57 (3d Cir. 1980).

There was, in the view of the Court of Appeals, an insufficient record to determine whether or not Penn State's Dormitory Solicitation Regulations with respect to group commercial solicitation in students' private dormitory rooms served "significant governmental interests" and nonetheless left open "ample alternative channels for communication." American Future Systems II, 688 F.2d at 915, citing Heffron vs. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48, 101 S.Ct. 2559, 2563-64 (1981). The Court of Appeals did not, therefore, reach the question whether the Regulations are valid. American Future Systems II, 688 F.2d at 915. On the Plaintiffs' motion for a preliminary injunction, this Court need not, of course, reach a definitive conclusion as to whether or not Penn State's Dormitory Solicitation Regulations regarding commercial activity in individual students' dormitory rooms violate the students'

constitutional rights. The Court need only determine that there is a "reasonable probability" of such a result.

It is well established that the First Amendment does not guarantee the rights of speech and association at all times and places or in any manner that may be desired. E.g. Adderley vs. Florida, 385 U.S. 39, 47-48 (1966); Poulos vs. New Hampsire, 345 U.S. 395, 405 (1953). Speech and associational rights, like all other First Amendment rights, are subject to reasonable time, place, and manner restrictions. Grayned vs. City of Rockford, 408 U.S. 104 (1972); Cox v. New Hampshire, 312 U.S. 569 (1941). The Supreme Court has "often approved restrictions [on the time, place, and manner of First Amendment activities] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." Heffron vs. International Society for Krishna Consciousness, 452 U.S. 640, 647-48 quoting Virginia State Board of

Pharmacy vs. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976).

Penn State's original Dormitory Solicitation Regulations with respect to "common room" activities were "content based" regulations which are, absent a compelling state interest, prohibited. American Future Systems II, 688 F.2d 907 (3d Cir. 1982). See Central Hudson Gas & Electric Corp. vs. Public Service Commission, 447 U.S. 557, 564-67 (1980); Consolidated Edison Co. vs. Public Service Commission, 447 U.S. 530, 536 (1980) (restrictions may not ordinarily be based upon either the content or subject matter of the speech.) Because Penn State's Dormitory Solicitation Regulations with respect to commercial activities in individual students' dormitory rooms permit the entirety of AFS's presentation to be made, the parties appear to agree that the regulations are not content-based. By definition, Penn State's Dormitory Solicitation Regulations distinguish between commercial and traditional first amendment free speech. However, such a distinction is not what is meant by "content-based" and has uniformly been upheld. Ohralik vs. Ohio

state Bar Association, 436 U.S. 447, 455-56 (1978) ("We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech....") See also Young vs. American Mini Theatres, 427 U.S. 50 (1976); Lehman vs. City of Shaker Heights, 418 U.S. 298 (1974); American Future Systems I, 618 F.2d at 257-59.

Penn State's Dormitory Solicitation Regulations with respect to commercial activities are void unless they "leave open ample alternative channels for communication of information." Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, 425 U.S. at 771. There is no doubt that Penn State's dormitory residents have ample opportunity, albeit on a one-on-one basis, to receive the presentation of AFS and other commercial solicitors. Student dormitory residents may also, without apparent limit, invite other students to their rooms. However, Penn State explicitly prohibits group demonstrations in its dormitories. There has been no evidence that Penn State provides "ample alternative

channels" where the substance of communication which exists at the group demonstrations would be permitted.

Even assuming that sufficient "alternative channels" for communication of the information exist Penn State's time, place and manner regulations will be upheld only if they serve a "significant governmental interest". Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Council, 425 U.S. at 771. See Grayned vs. City of Rockford, 408 U.S. at 108. At the hearing, Penn State advanced a variety of purported justifications for its Dormitory Solicitation Regulations with respect to commercial activity in students' dormitory rooms. According to Penn State, regulations of such commercial activity is proper because (a) such activity could invade the privacy of students; (b) such activity could disrupt students while studying or sleeping; (c) such activity could disrupt the educational and personal developmental programs of the Office of Residential Life Programs; (d) such activity could disrupt the activities of student government; (e) such activity could disrupt organized and informal social and

recreational activities of students; (f) disruptions, to the extent that they occur, would be for a purpose unrelated to the purpose for which residence halls are dedicated; (g) the greater the frequency of the solicitaion of money and sales of products and services, the more likely disruptions would occur; (h) such activity could displace some of the normal activities carried on in a residence hall; (i) such activity would require Penn State to exercise controls on the commercial activities which could divert resources and efforts from the purposes to which they are now used; (j) group solicitations and sales are incompatible with the uses to which the residence halls are dedicated; and (k) group solicitations and sales have the potential for deception, fraud, and overreaching.

Penn State's enunciation of its alleged "significant governmental interest" is unconvincing. Penn State's Dormitory Solicitation Regulations clearly allow a dormitory resident to invite to his room, expressly for purposes of commercial solicitation, any person, business, or commercial firm. A dormitory resident may also invite unlimited numbers of students to

his room. However, Penn State finds a combination of a sales representative and a large number of students in a student's room to be so invidious that such a combination is prohibited by Penn State's Dormitory Solicitation Regulations. This position is illogical and does not serve any legitimate governmental interest.

First, Penn State expresses concern over the invasion of students' privacy rights. Because these privacy rights are individual rights of the students, it is absurd to think that these rights could not be waived by the students. Second, with respect to disruption of students while studying or sleeping, there appear to be many "permitted" activities in the dormitories which are substantially more disruptive. Furthermore, there is no evidence that AFS or any other commercial organization would refuse to comply with reasonably drafted regulations to prevent such disruption. With respect to the concern of Penn State that group solicitations could disrupt the educational and personal development programs in the dormitories, no such potential for disruption has been demonstrated. This

justification seems particularly contrived where business and solicitation activities might well be just the sort of "life training" which should take place in a dormitory. The Court is unable to envision a situation where group solicitation activities of the sort contemplated by AFS would disrupt student government or either organized or informal social and recreational activities. Penn State is concerned that the imagined disruptions are inconsistent with the purposes to which residence halls are dedicated and that greater frequency of solicitation activities would lead to such disruptions. This "floodgate" argument is not persuasive in light of the evidence.

In sum, Penn State's concerns are not valid. The real concern of Penn State appears more to be related to the "high pressure" sales tactics of AFS than group solicitation in general. This concern of Penn State may not properly be addressed by a wholesale limitation on group solicitation activities. There are, no doubt,

appropriate avenues of relief should AFS's commercial activities be proven either illegal or improper.

As drafted, Penn State's regulations do not address the anticipated problems. Significantly, Penn State's present regulations are not reasonably drafted to prohibit disruptive activities but, instead, presume disruption will result. Because there is no practical distinction between one-on-one solicitations and group solicitations in terms of safety, security, and other purported state interests, a wholesale preclusion of group solicitations is probably grossly overbroad.

For all of the foregoing reasons, Penn State will likely not establish at trial that its Dormitory Solicitation Regulations "serve a significant governmental interest." There is, therefore, a reasonable probability that the students will succeed on the merits in this litigation.

C. Balancing of Equities and Protection of the Public Interest.

The Court must consider the possibility o. harm to the non-moving party and may, in appropriate situations, consider harm to the public interest. Continental Group, Inc. vs. Amoco Chemical Corp., 614 F.2d 351, 356-57 (3d Cir. 1980). Because this is an affirmative injunction, as opposed to one retaining the status quo, the equities must weigh decidedly in the students' favor in order for them to prevail in their request for injunctive relief. Schlesinger vs. Carlson, 489 F.Supp. 612, 619 (M.D. Pa. 1980). Penn State has not advanced any legitimte interests which would justify its Dormitory Solicitation Regulations with respect to commercial activities in individual students' rooms. Penn State's proferred justifications do not appear sound. Thus, the equities would appear not to weigh in Penn State's favor.

At the same time, the student Plaintiffs have identified substantial and legitimate constitutional rights which are

being impinged upon by Penn State's Regulations. This Court has no doubt as to the sincerity of the student Plaintiffs in this litigation. Because the students' injuries cannot be calculated in terms of money damages and the students' tenure in the Penn State residence halls is limited in duration, the equities, therefore, decidedly weigh in favor of the students.

Penn State is a public university whose residence halls house over 12,000 students. Because the challenged regulations directly affect the free speech and associational rights of all of those students the public interest is, therefore, decidedly implicated in this case. Penn State's correlative interest in attempting to protect its students from sharp business practices has expressly and consistently been rejected. First, the principal of in loco parentis appears no longer to apply to college students. Bradshaw vs. Rawlings, 612 F.2d 135, 139 (3d Cir. 1979) ("College students today are no longer minors; they are regarded as adults in almost every phase of community life."). Second, the public interest in regulating activities within a dormitory

room is limited. A college dormitory room is the equivalent of a student's "home away from home," American Future Systems I, 464 F.Supp. at 1262, and students have at least a modicum of expectation of privacy in their dormitory rooms. E.g. Piazzola vs. Watkins, 442 F.2d 284, 289-90 (5th Cir. 1971). But see American Future Systems II, 688 F.2d at 915-16. ("We are unwilling to extend the constitutional right of privacy [of a student in his dormitory room] to commercial transactions completely unrelated to fundamental personal rights.")

In sum, the public interest would be served by issuance of an injunction.

D. Scope of Relief.

The Plaintiffs have requested a preliminary injunction directing the Defendants "to permit persons residing in University residence halls to have business invitees and social guests of their choosing come to their assigned room(s) for any lawful purpose, at reasonable times and subject to other health, safety, security, fire, occupancy, and/or visitation regulations, as applied to social guests under present University

regulations." In essence, the Plaintiffs request that the Dormitory Solicitation Regulations regarding commercial solicitation in individual students' dormitory rooms be deemed unenforceble as against all students residing in Penn State's residence halls.

As stated previously, a preliminary injunction is only appropriate where the movants have established a reasonable probability of ultimate success on the merits in the litigation. Continental Group vs. Amoco Chemical Corp., 614 F.2d at 356-57. The normal function of preliminary injunctive relief is to maintain the status quo and to ensure that the movants suffer no further injury pending a full hearing on the merits. E.g. Triebwasser & Katz vs. American Telephone and Telegraph Co., 535 F.2d 1356 (2d Cir. 1973); King vs. Saddleback Junior College Dist., 425 F.2d 426 (9th Cir. 1970), cert. denied, 404 U.S. 979 (1971). In order adequately to protect the non-moving party, in no event should preliminary injunctive relief be issued beyond relief to which the movants

would be entitled should they ultimately prevail in the litigation.

The Plaintiffs' request for a declaratory judgment is based on the Declaratory Judgment Act, 28 U.S.C. §2201. Section 2201 provides that "In a case of actual controversy...any court of the United States...may declare the rights and other legal relations of any interested party seeking such declaration..." The "case or controversy" requirement under Section 2201 is no less stringent than in any other federal lawsuit. Alvater vs. Freeman 319 U.S. 359 (1943); United States vs. West Virginia, 295 U.S. 463 (1935).

The issue being litigated at this juncture is whether or not Penn State's Dormitory Solicitation Regulations may be enforced to preclude dormitory residents from inviting both commercial sales representatives and other students simultaneously to the student's dormitory room for purposes of a group demonstration and sale. It is quite clear that the Declaratory Judgment Act may not be used to secure a judicial determination of moot questions, Aetna Life Insurance Co. of Hartford vs. Haworth, 300 U.S. 227 (1937).

With respect to those individual Plaintiffs who are no longer Penn State students or who are no longer residing in Penn State's residence halls, the controversy in this litigation is moot. Those students lack a present legally cognizable interest in the outcome of this lawsuit and there is no likelihood that any "injury" to those students is capable of repetition yet evading review. Weinstein vs. Bradford, 423 U.S. 147, 148-49 (1975), citing Sosna vs. Iowa, 419 U.S. 393 (1975); Powell vs. McCormack, 395 U.S. 486 (1969); Southern Pacific Terminal Co., vs. ICC, 219 U.S. 498 (1911); Winsett vs. McGinnis, 617 F.2d 996, 1003 (3d Cir. 1980), cert. denied sub nom Anderson vs. Winsett, 449 U.S. 1093 (1981).

The only student Plaintiffs who have a "live" controversy are those named student plaintiffs who are presently residing in Penn State's residence halls and who desire to serve as host or hostess for a group demcnstration and solicitation. Kevin Graves is the only such named student plaintiff who has standing to sue and there is some doubt

that he wishes to host one of the demonstrations although he obviously is serious about asserting his right to do so.

On the first day of the preliminary injunction hearing, December 2, 1982, Plaintiffs filed an oral application for Marc Bogutz, a Penn State student who resides in a fraternity house, and Kathryn Johnson, a freshman Penn State student who resides in a Penn State dormitory, to be allowed to intervene as Plaintiffs. Because there was objection to the request and because the Defendants were caught by surprise, the Court declined to grant the motion. Plaintiffs were directed to file a formal written motion with a modest supporting brief if they desired to pursue the matter. On December 14, 982, Plaintiffs filed a motion and memorandum of law to join Kathryn Johnson as an additional Plaintiff. The motion is not yet ripe for dispostion by the Court and, therefore, will not be acted upon at this time. Apparently recognizing that Marc Bogutz had no standing, Plaintiffs have not filed

a motion that he be added as a party Plaintiff.

This lawsuit was not brought as a class action, and there is no request pursuant to Rule 23 for certification of a class of student Plaintiffs residing in Penn State's residence halls. Because there is no student plaintiff class, relief to any person or group of persons beyond those who have actual standing would be improper. Cf. Workman vs. Mitchell, 502 F.2d 1201 (9th Cir. 1974).

For the foregoing reasons, absent class certification or a request for such certification, Kahan vs. Rosensteil, 424 F.2d 161, 169 (3d Cir.), cert. denied, sub nom Glen Alden Corp. vs. Kahan, 398 U.S. 950 (1970), injunctive relief will be granted only with respect to Kevin Graves.

IV. Conclusions of Law.

1. Kevin Graves, the only named Plaintiff who resides in Penn State's residence halls, is the only Plaintiff who has standing to request preliminary injunctive relief.

2. Kevin Graves would be irreparably harmed if a preliminary injunction is not issued.

3. Kevin Graves has a reasonable probability of succeeding on the merits in this litigation.

4. The "equities" weigh heavily in favor of granting preliminary injunctive relief in favor of Kevin Graves.

5. The public interest will be served by granting preliminary injunctive relief to Kevin Graves.

An appropriate order will be entered.

/s/Muir
MUIR, U.S. District Judge

DATED: December 21, 1982

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al., Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed 2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al., Defendants	:	(Judge Muir)

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IN THE UNITED STATES DISTRICT COURT
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AMERICAN FUTURE SYSTEMS, INC., et al., Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed 2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al., Defendants	:	(Judge Muir)

OPINION

MUIR, District Judge.

I. Introduction.

Plaintiffs, American Future Systems, Inc. (AFS), Steven Brubaker, Richard J. Wingert, W. Bruce DelValle, Joan D. Varsics, Dennis C. Habecker, John B. Spillar and Kevin Graves, filed this action alleging violation of their constitutional rights and rights granted by Pennsylvania law by Defendants the Pennsylvania State University (Penn State), the Board of Trustees of Penn

State, John D. Oswald and M. Lee Upcraft on February 5, 1981. This is the second lawsuit before the Court involving Penn States's regulation of commercial activities in its dormitories.

In the first lawsuit, judgment was granted in favor of Penn State upholding its regulations against an attack that they violate the First Amendment rights of AFS. American Future Systems, Inc. vs. Pennsylvania State University, 464 F.Supp. 1252 (M.D. Pa. 1979) (Muir, J.), aff'd, 618 F.2d 252 (3d Cir. 1980) (American Systems I. In this case, the second lawsuit filed by American Future Systems, Plaintiffs filed a motion for a preliminary injunction which was denied by this Court in American Future Systems v. Pennsylvania State University, 510 F.Supp. 983 (M.D. Pa. 1981) (Muir, J.) (American Future Systems II). By opinion and order of September 16, 1981, this Court granted summary judgment in favor of the Defendants. American Future Systems II, 522 F.Supp. 544 (M.D. Pa. 1981) (Muir, J.). On August 9, 1982, the Court of Appeals reversed this Court's grant of summary judgment and remanded the case to

this Court for further proceedings. American Future Systems II, 688 F.2d 907 (3d Cir. 1982).

On October 18, 1982, Plaintiffs AFS, Kevin Graves and other student plaintiffs renewed their motion for a preliminary injunction. A hearing on the Plaintiff's motion commenced on Thursday, December 2, 1982, and concluded on Saturday, December 4, 1982. On December 21, 1982, this Court issued a opinion and order with respect to the motion for preliminary injunction. American Future Systems v. Pennsylvania State University, 553 F.Supp. 1268 (M.D. Pa. 1982) (Muir, J.) (American Future Systems III). The Court's order provided, inter alia, that:

> Pending final hearing or further order of this Court, Defendants John W. Oswald, M. Lee Upcraft, the Board of Trustees of the Pennsylvania State University, Pennsylvania State University, and its employees and agents, are hereby enjoined from enforcing Paragraph 3 of the "Regulations for the Solicitation of Money or the Sale or Solicitation of Sale of Products or Services in University Resident Halls," promulgated November 19, 1982, with respect to Kevin Graves, the only named individual student plaintiff who

> resides in Penn State's residence halls.
> Order of December 21, 1982 at ¶6.

The Court further placed the case on the Court's Williamsport, July 1983 trial list for disposition on the merits.

On December 14, 1982, while the motion for a preliminary injunction was under advisement before the Court, Plaintiffs filed a motion to join Kathy Johnson as an additional Plaintiff in this action. The motion was granted on January 18, 1983.

On February 7, 1983, Plaintiffs filed a motion for summary judgment. By order of March 10, 1983, the motion for summary judgment was denied by the Court. In particular, the Court noted that its findings of fact and conclusions of law in the December 21, 1982 opinion were based solely on and limited to the evidence and legal arguments submitted relating to a request for preliminary injunctive relief. The Court expressly stated in its opinion of December 21, 1982 that, at that juncture, it was "only proper for the Court to determine whether or not Plaintiffs have satisfied the requirements for the issuance of a preliminary

injunction granting relief sought in the complaint." American Future Systems III, 553 F.Supp. at 1277. With respect to the rights of the student plaintiffs, the Court stated that "It is likely that the free flow of ideas resulting from attendance at group commercial demonstrations and solicitations is protected by the First Amendment. The right to serve as host or hostess for such demonstrations is also likely protected." American Future Systems III, 553 F.Supp. at 1278 (emphasis added). The Court concluded in its opinion granting preliminary injunctive relief that "Penn State's enunciation of its alleged 'significant governmental interest' [supporting the Dormitory Solicitation Regulations] is unconvincing...." and that "...Penn State will likely not establish at trial that its dormitory solicitation regulations 'serve a signifcant governmental interest.'" 553 F.Supp. at 1280-1281 (emphasis added). Envisioning that Penn State would produce evidence at trial which might substantiate its Dormitory Solicitation Regulations, the

Court denied the Plaintiffss motion for summary judgment.

On April 26, 1983, the Court approved a stipulation in which Plaintiffs and Defendants agreed that no further evidence would be presented. Plaintiffs and Defendants further stipulated that the following additional fact be made part of the record:

> Kathy Johnson is a party to this action who, as of the date of this Stipulation, is a freshman at Penn State and resides in a dormitory room in a University residence hall. She has desired and continues to desire to host and/or attend the kind of demonstration conducted by the Plaintiff, American Future Systems, and which is precluded under university regulations. Stipulation at ¶6(a).

The parties agreed to submit briefing on the application for a permanent injunction.

On June 13, 1983, for the first time during the period of approximately 5-1/2 years since this and its companion litigation began (American Future Systems I was filed on December 22, 1977), the Defendants filed a motion to dismiss the

complaint for lack of subject matter jurisdiction, contending that the actions of Penn State's Board of Trustees and officials do not constitute conduct under color of state law. By order of July 26, 1983, the Court concluded that it was well settled in this Circuit that the actions of Penn State constituted conduct under color of state law. E.g., Benner v. Oswald, 444 F.Supp. 545 (M.D. Pa. 1978) (Muir, J.), aff'd, 592 F.2d 174 (3d Cir. 1979); Klain vs. Pennsylvania State University, 434 F.Supp. 571 (M.D. Pa. 1977) (Herman, J.); Braden v. University of Pittsburgh, 392 F.Supp. 118 (W.D. Pa. 1975), aff'd, 552 F.2d 956 (3d Cir. 1977). Accordingly, the motion of the Defendants to dismiss the complaint was denied.

II. Discussion.

As a result of the narrowing of the issues in this litigation, the sole question before the Court is whether or not Penn State's Dormitory Solicitation Regulations limiting commercial activities in individual student's dormitory rooms violate the constitutional rights of the

student Plaintiffs. The parties agree that the only student plaintiffs who have standing to challenge the Dormitory Solicitation Regulations are students who are presently residing in Penr State's residence halls and who desire to serve as host or hostess for a group demonstration and solicitation such as that provided by AFS. Kevin Graves and Kathy Johnson are the only such named student Plaintiffs who have standing to sue.

While the issue of the validity of Penn State's Dormitory Solicitation Regulations has twice been to the Court of Appeals of this Circuit, American Future Systems II, 688 F.2d 907 (3d Cir. 1982); American Future Systems I, 618 F.2d 252 (3d Cir. 1980), the primary emphasis of prior litigation has related to the rights of AFS and presentations in "common areas" of Penn State's residence halls. As a result of recent case law in this Circuit, the issues of the rights of AFS and presentations in "common rooms" areas are no longer directly involved in this case. See International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority, 691 F.2d 155 (3d

Cir. 1982); American Future Systems III, 553 F.Supp. at 1276-77. See also, American Future Systems I, 618 F.2d at 256. Cf. Petition of Plaintiffs for Leave to Amend or Supplement Complaint and Motion for Preliminary Injunction Doc. No. 150, filed on November 29, 1982 and Orders Granting Petition, Doc. Nos. 175, 176, filed December 2, 1982. Thus, there is little guidance from the Court of Appeals in its prior decisions in the American Future Systems litigation on the issue presently before the Court.

Preliminarily the Court must determine the extent to which the student Plaintiffs have constitutional rights which are infringed, if at all, by Penn State's Dormitory Solicitation Regulations. The Defendants take the position that the speech at issue in this case is "commercial" in nature and, therefore, not subject to First Amendment protection. The Defendants rely on Central Hudson Gas and Electric v. Public Service Commission, 447 U.S. 557 (1980), in which the Court declared that "At the outset, we must determine whether the expression is protected by the First Amendment. For

commercial speech to come within that provision, it at least must concern lawful activity and not be misleading." 447 U.S. at 566. The Defendants contend that AFS's presentation is misleading, if not unlawful, and point to several Federal Trade Commission regulations which AFS's presentation is alleged to violate. See 16 C.F.R. §429.1 et seq.

The reliance of the Defendants on Central Hudson Gas is misplaced. As recognized by this Court in American Future Systems III, the issue is not whether the precise presentation of AFS may or may not be permitted in Penn State's residence halls. Instead, the issue is whether Penn State's Dormitory Solicitation Regulations may be enforced to prevent students from exercising their First Amendment speech and associatonal rights. As defined by the Supreme Court, commercial speech is "speech which does no more than propose a commercial transaction.'" Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976), quoting Pittsburgh Press Co. v. Human Relations Commission, 413 U.S. 376, 385 (1973).

Clearly, the communicative process at issue here, at least with respect to the students, does not involve solely commercial speech. Cf., Ad World, Inc. v. Township of Doylestown, 672 F.2d 1136, 1140 (3d Cir. 1982) (category of "commercial speech" limited to "purely commercial advertising").

Plaintiffs Graves and Johnson testified that their reasons for participting in AFS demonstrations are primarily educational, social and cultural and not "commercial." Graves testified that he wanted to act as a host at an AFS sales demonstration as follows:

> At the time, I really didn't know too much about AFS. I guess the main reason was I wanted to learn a little bit more. As you can probably guess, I really have no need for china or cookware right now. I wanted to learn about it. Another reason was, I don't know -- as you probably know, since you went to college, sometimes study breaks are common if you have been studying for a few hours. I thought it would be a good way for me and a few of my friends to get together and possibly learn a little bit more. It's also a good way to get people in my room, some people I didn't know, meet new people.
> N.T. December 2, 1982 at 80.

Johnson stated her reasons for desiring to attend an AFS demonstration as follows:

> Mainly curiosity. I like shopping so I can find out what the best buys are. This seemed like an ideal situation to find out not only what AFS had to offer me, but also how to tell good quality china and things like that. And it seemed like a neat idea.
>
> ***
>
> The main thing is having the group around you because it's like in a classroom when you're scared to ask a question or you won't ask it because someone next to you will. Or if they ask a question and you come up with another one, then you have somebody to relay your information off of and you can always get a second opinion on what the seller has to say.
> N.T. December 2, 1982 at 100.

Free flow of ideas resulting from attendance at group commercial demonstrations and solicitations is a constitutionally protected right of the student Plaintiffs. See NAACP v. Alabama, 357 U.S. 449, 460 (1958). See also, Stanley v. Georgia, 394 U.S. 557, 564 (1969) (it is "well established that the

constitution protects the right to receive information and ideas"); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) (where there is constitutionally protected free speech, "the protection afforded is to the communication, to its source and to its recipients both"). E.g., Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979); Board of Education, Island Trees Union Free School District No. 26 v. Pico, ___ U. S. ___, 102 S.Ct. 2799, 2806-08 (1982).

The fact that the constitutional rights of the student Plaintiffs are adversely affected by Penn State's Dormitory Solicitation Regulations only begins the inquiry. As the Court of Appeals of this Circuit stated in American Future Systems II, "...even speech entitled to the highest First Amendment protection may be subject to reasonable time, place and manner regulations that are content-neutral, serve a significant governmental interest, and leave open ample alternative channels for communication of the information." American Future Systems II 688 F.2d at

915, citing Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981). See American Future Systems III, 553 F.Supp. at 1279, citing Adderley v. Florida, 385 U.S. 39, 47-48 (1966); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953).

This Court concluded in American Future Systems III that Penn State's Dormitory Solicitation Regulations with respect to group commercial solicitation students' private dormitory rooms were not "content based." 553 F.Supp. at 1280, citing Ohralik v. Ohio State Bar Association, 436 U.S. 447, 455-56 (1978) ("We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech ...."); Young v. American Mini Theatres, 427 U.S. 50 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); American Future Systems I, 618 F.2d at 257-59. No party contests this conclusion of the Court.

Penn State's Dormitory Solicitation Regulations with respect to commercial

activities are void unless they "leave open ample alternative channels for communication of information." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 771. On the motion for a preliminary injunction, the Court stated as follows:

> There is no doubt that Penn State's dormitory residents have ample opportunity, albeit on a one-on-one basis, to receive the presentation of AFS and other commercial solicitors. Student dormitory residents may also, without apparent limit, invite other students to their rooms. However, Penn State explicitly prohibits group demonstrations in its dormitories. There has been no evidence that Penn State provides "ample atlernative channels" where the substantive communication which exists at the group demonstrations would be permitted.

American Future Systems III, 553 F.Supp. at 1280.

Penn State now points to evidence introduced at the preliminary injunction hearing which would support the view that it has, in fact, provided "ample alternative channels" for the communication of the information at issue in this lawsuit. In particular, the

Defendants note that AFS itself has specified alternative off-campus locations for an AFS presentation, including "(a) friend's apartment; (b) local church meeting room; (c) YWCA meeting room; (d) nearby hotel, motel." N.T. December 3, 1982 at 190. The Defendants note that since the Plaintiffs can clearly go off-campus to receive this information, "ample alternative channels" are available. E.g., Greer v. Spock, 424 U.S. 828, 839 (1976) (servicemen who were required to go off of a military base to conduct first amendment protected activities had "ample alternative channels" of communication available to them). Furthermore, according to Defendant Upcraft, Director of Residential Life Programs at Penn State, the entirety of sales demonstrations such as that presented by AFS could be held at the Nittany Lion Inn, a Penn State-operated hotel which is located on the Penn State campus, is open to the public, and has facilities for the use of outside vendors in which to demonstrate, solicit contracts for sale and sell their products. N.T. December 4, 1982 at 79. Certainly, an off

campus presentation or one which took place at the Nittany Lion Inn would not be as convenient for students as would be a demonstration in the dormitories. However, convenience along cannot dictate the result here, cf., Greer v. Spock, 424 U.S. 828 (1976), and the Court concludes that Penn State's Dormitory Solicitation Regulations leave open "ample alternative channels" for communication of information.

Even assuming that Penn State's Dormitory Solicitation Regulations with respect to group commercial solicitation in students' private dormitory rooms are not "content based" regulations and leave open "ample alternative channels" for communication of information, Penn State's time, place and manner regulations on commercial activities in its dormitories may be upheld only if they serve "a significant governmental interest." Heffron v. International Society for Krishna Consciousness, 452 U.S. at 647-48, quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 771 (1976). See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Penn State has advanced a variety of purported justifications for its Dormitory Solicitation Regulations with respect to commercial activities in students' dormitory rooms. According to Penn State, regulation of such commercial activity is proper because:

(a) Such activity could invade the privacy of students;

(b) Such activity could disrupt students while studying or sleeping;

(c) Such activity could disrupt the educational and personal development programs of the Office of Residential Life Programs;

(d) Such activity could disrupt the activities of student government;

(e) Such activity could disrupt organized and informal and social and recreational activities of students;

(f) Disruptions, to the extent that they occur, would be for a purpose unrelated to the purpose for which residence halls are dedicated;

(g) The greater the frequency of the solicitation of money and sales of products and sales of

services, the more likely disruptions would occur;

(h) Such activity could displace some of the normal activities carried on in a residence hall;

(i) Such activity would require Penn State to exercise controls on the commercial activities which could divert resources and efforts from the purpose for which they are now used;

(j) Group solicitations and sales are incompatible with the uses to which the residence halls are dedicated; and

(k) Group solicitations and sales have the potential for deception, fraud and overreaching.

American Future Systems III, 553 F.Supp. at 1280.

This Court noted in its opinion granting the motion of the Plaintiffs for a preliminary injunction that Penn State's enunciation of its alleged "significant governmental interests" is unconvincing. See American Future Systems III, 553 F.Supp. at 1280-81. Rather than attempting to introduce further evidence at the trial on the merits which might convince the Court of the existence of

"significant governmental interests" to support Penn State's Dormitory Solicitation Regulations, Penn State has concluded that no further evidence is necessary and has stipulated that the Court should decide the case for final injunction purposes based upon the evidence submitted by parties at the preliminary injunction hearing. In declining to present further evidence, Penn State apparently is of the view that the evidence submitted at the preliminary injunction hearing suffices to dictate the result that Penn State's Dormitory Solicitation Regulations, in fact, serve "significant governmental interests."

When the Court entered its preliminary injunction it found Penn State's enunciation of its alleged "significant governmental interests" unconvincing and the Court is of a similar view today. "Residence halls are in essence a student's home away from home" American Future Systems I, 464 F.Supp. at 1262. See also, Brush v. Pennsylvania State University, 489 Pa. 243, 249, 414 A.2d 48, 51 (1980). As such, the Court concluded that Penn State's profferred statement of

reasons to support its Dormitory Solicitation Regulations was not compelling. See American Future Systems III, 553 F.Supp. at 1281.

This Court remains unconvinced that Penn State's Dormitory Solicitation Regulations serve any significant governmental interests. Paragraph 3 of the "Regulations for the Solicitation of Money or Sale or Solicitation of Sale of Products or Services in University Residence Halls", promulgated Novemer 19, 1982, violates the constitutional rights of student Plaintiffs Graves and Johnson.

A permanent injunction and declaratory judgment will issue.

MUIR, U.S. District Judge

Dated: August 5, 1983

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed
	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

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WILLIAMSPORT, PA.
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DONALD R. BERRY, Clerk
PER. .....
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed
	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

OPINION

MUIR, District Judge.

Plantiffs filed this action alleging violations of their constitutional rights and of rights granted by Pennsylvania law on February 5, 1981. Jurisdiction is alleged to arise under 28 U.S.C. §§ 1331 and 1343 and the doctrine of pendent jurisdiction. Also on February 5, 1981, Plaintiffs filed a motion for a preliminary injunction which was denied by this Court in American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983 (M.D. Pa. 1981). On July 17, 1981, Defendants filed a motion for summary judgment and supporting brief. On August 24, 1981, Plaintiffs responded, and on August 31, 1981, Defendants filed a reply. For the reasons set forth below, Defendants' motion for summary judgment will be granted.

This case is the second one before the Court involving policies of Pennsylvania State University (Penn State) relating to commercial activities in its dormitories. In the first lawsuit, judgment was granted in favor of Penn State upholding its regulations against an attack that they

violated American Future Systems' (AFS) First Amendment rights American Future Systems, Inc. vs. Pennsylvania State University, 464 F.Supp. 1252 (M.D. Pa. 1979), *aff'd* 618 F.2d 252 (3d Cir. 1980) (*"American Future Systems I"*).

AFS is a corporation whose principal business is the sale of cookware, china, crystal, and silverware through demonstrations of its merchandise at colleges throughout the United States. AFS seeks by this action to be permitted to present sales demonstrations at the invitation of individual students in the common areas and dormitory rooms within the residence halls of Penn State, to disseminate commercial information to groups of students through sales demonstrations at the invitation of individual host students in their individual dormitory rooms, and to consummate sales to individual students in the student hosts' rooms and residence halls of Penn State. Plaintiffs Wingert and Brubaker are Penn State students who formerly resided in Penn State residence halls. Wingert withdrew as a student at Penn State in February 1981 and is no longer enrolled. Brubaker, while still enrolled as a student, no longer resides in a Penn State residence hall. Wingert and Brubaker seek relief permitting them to invite AFS to common areas and their individual dormitory rooms and residence halls, to conduct in their rooms and in common areas of residence halls, sales demonstrations to groups of invited students and to invite AFS to their dormitory rooms for purposes of consummating sales of goods to other students following the demonstrations. Plaintiffs DelValle, Varsics, Habacher and Spiller are current Penn State students who do not reside in residence halls. DelValle, Varsics, Habacher and Spiller seek an order permitting them to attend and participate in AFS group demonstrations in common areas

and dormitory rooms and to consummate sales from AFS in those rooms.

As this Court already held in its denial of Plaintiffs' motion for a preliminary injunction, the policy of Penn State during the time that *American Future Systems I* was litigated and now is that (1) AFS may conduct group demonstrations in specified common areas of each residence hall; (2) following those demonstrations a student may invite an AFS representative to the student's room to purchase AFS goods; (3) AFS is free to solicit invitations to individual students' rooms at the group demonstrations or by telephone or mail; (4) AFS is not permitted to conduct group demonstrations in an individual dormitory room; (5) AFS is not permitted to consummate sales in dormitory rooms to a purchaser other than the occupant of the room; (6) AFS is not permitted to conduct group solicitations of sales in the common areas of residence halls; (7) AFS is not permitted to consummate commercial transactions in the common areas of residence halls. American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983, 985 (M.D. Pa. 1981). It is Plaintiffs' position that under the ruling of the Court of Appeals in *American Future Systems I* they are entitled to the relief sought in this action. Defendants are of the view that their policies relating to commercial activities in Penn State's dormitories are consistent with the Court of Appeals' opinion in *American Future Systems I*, and that Plaintiffs are not entitled to relief.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions in the record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c) of the Federal Rules of Civil Procedure.

Because the bases for granting summary judgment are somewhat different as to Plaintiff AFS, to Plaintiffs Wingert and Brubaker, and to Plaintiffs DelValle, Varsics, Habacher and Spiller, AFS and each group of individual Plaintiffs will be discussed separately.

I. AFS.

AFS's primary contention is that the decision of the Court of Appeals in *American Future Systems I* granted AFS certain rights that Penn State has abridged. To the contrary, the Court of Appeals' opinion contains no declaration of AFS's rights, and in that opinion the Court concluded that Penn State's policies governing commercial activity was wholly consistent with AFS's First and Fourteenth amendment rights. The Court of Appeals recognized that a total suppression of AFS's commercial speech would probably violate AFS's constitutional rights. *American Future Systems I,* 618 F.2d at 258. In holding that Penn State's distinction between non-commercial and commercial speech was valid, the Court of Appeals noted that Penn State had only restricted, rather than suppressed, speech. "[AFS] sales representatives are allowed into the residence halls to present demonstrations to groups of students, [but] they cannot consummate sales at these gatherings. Even that restriction is removed if the sales representative is invited to the hall by an individual student who decides to purchase the merchandise marketed by AFS." 618 F.2d at 258. There is a dispute as to whether the Court of Appeals' decision in *American Future Systems I* actually vests in AFS the *right* to set up group demonstrations of its products in the Penn State residence halls. However, inasmuch as Penn State policies permit such group demonstrations, this Court need not reach that question. The issues now before the Court are (1) whether

Penn State may limit AFS to presentations in common areas, as opposed to private rooms, and may limit AFS's actual solicitation to private rooms and not permit such solicitation in common areas; and (2) whether AFS's proposed presentation does in fact constitute solicitation, in whole or in part.

Penn State's policy governing commercial activity in its residence halls has remained unchanged since AFS made its initial attempts to conduct demonstrations of its products in 1977. Specifically, in effect at the time of the *American Future Systems I* litigation was Penn State's policy that AFS could present demonstrations, but not solicitations of sales in the common areas of residence halls, and that AFS is free to consummate commercial transactions (i.e. solicitation) in student's rooms, but not in common areas. *See American Future Systems I,* 464 F.Supp. 1252, 1258 (¶ 59); American Future Systems vs. Pennsylvania State University, 510 F.Supp. 983, 985 (M.D. Pa. 1981). The record shows that AFS was aware of this policy at the time that it filed the *American Future Systems I* action. *See American Future Systems I,* 464 F.Supp. at 1258 (¶ 59). AFS's attempt to relitigate the constitutionality of Penn State's policies regarding commercial activities in dormitories is barred by the doctrine of res judicata.

The doctrine provides that a party who has suffered an adverse judgment may not, in subsequent litigation against the same party, seek to relitigate any issue that was or *could have been* determined in the first action. *See* Montana vs. United States, 440 U.S. 147, 153-54 (1979). The purpose of this doctrine is to ensure finality in the adjudication of disputes and to provide a conclusive resolution not only of matters that were actually considered but also of all of those which could have been considered.

Cramer vs. General Telephone & Electronics Corp., 582 F.2d 259, 266 (3d Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979).

In order for res judicata to apply, three elements must be present: (1) there must be an identity of parties; (2) there must be in existence a valid, final judgment on the merits by a Court of competent jurisdiction; and (3) the second action must concern the same subject matter or cause of action as the prior suit. Sworob vs. Harris, 451 F.Supp. 96, 99-100 (E.D. Pa.) *aff'd* 578 F.2d 1376 (3d Cir. 1978) (memorandum). There can be no dispute as to the first two requirements. Here, AFS and the same Penn State defendants have been involved in both actions. Further, there is a final, valid judgment upholding Penn State's policy governing commercial activities in dormitories. As to the third requirement, the second action may be said to involve the same cause of action if liability is sought to be imposed on a different theory but based on the same "liability creating conduct" of the Defendant which gave rise to the first action. Coggins vs. Carpenter, 463 F.Supp. 270, 280 (E.D. Pa. 1979), *citing* Williamson vs. Columbia Gas & Electric Corp., 186 F.2d 464 (3d Cir. 1950), *cert. denied,* 341 U.S. 921 (1951). Based on the allegations of Plaintiffs' complaint, the exhibits attached thereto, and affidavits submitted in this matter, the Court concludes that AFS is complaining about the same conduct of which it complained in *American Future Systems I,* namely Penn State's regulations limiting access by AFS to the university's dormitories. The Court also concludes that AFS had in that action opportunity to present to the Court and to the Court of Appeals any claims it might have had as to the precise contours of the permissible scope of group demonstrations as well as any other matters relating to any other constitutional rights that may have been adversely affected by Penn State's policies. Since the

Court of Appeals has already upheld the validity of Penn State's policies with respect to commercial activities within residence halls, and since AFS had a full and fair opportunity to litigate the validity of that policy, or any aspect thereof, in the first action, res judicata operates to preclude AFS's challenge to that policy in this action. Therefore, summary judgment will be granted in favor of the Plaintiffs as to AFS's claim that Penn State's policy with respect to commercial solicitation and activity in the dormitories violates AFS's First and Fourteenth Amendment rights.

AFS's second claim is that Penn State's position that it may censor the substance of AFS's demonstrations violates AFS's constitutional rights. Penn State contends that certain portions of the AFS demonstration involve the solicitation of sales rather than educational or informational material within the normal meaning of "demonstration." Penn State claims that these provisions which involve price, credit and guarantee terms, are properly considered commercial rather than educational in nature, and are therefore properly restricted to individual solicitation in private rooms and may be excluded from the demonstrations in common areas. (Defendants' Brief in Support of Motion for Summary Judgment at pp. 11-12.) AFS, in response, claims that if it were to present its demonstrations in the manner required by the University, it might appear to its listeners to be engaging in sharp business practices. AFS claims that if it is allowed to demonstrate and display its products, but is not allowed to give information regarding prices, guarantees, exchange policies and specially designed credit terms to fit students' budgets, its sales representatives' credibility as legitimate and honest people would be undermined. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at pp. 8-9).

The Court of Appeals' decision in *American Future Systems I* specifically upheld Penn State's regulations to the extent that they rested upon a distinction between commercial and non-commercial speech. Addressing the question of solicitation and consummation of sales in common areas, the Court of Appeals first noted that Penn State had advanced reasonable objectives to support its ban on group commercial activity in its residence halls. Finding that Penn State had not acted in an arbitrary, capricious, or invidious manner in distinguishing between commercial and non-commercial speech (i.e. solicitations as opposed to demonstrations), the Court concluded that Penn State's policies do not violate the First Amendment. *American Future Systems I,* 618 F.2d at 259. Thus, AFS's position that the Court of Appeals did not anticipate or recognize distinctions between educational programs and commercial solicitation (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 8) is clearly erroneous.

In *American Future Systems I,* this Court and the Court of Appeals were not faced with the question of whether particular aspects of AFS's presentations were educational or commercial. Thus, this aspect of AFS's claim is not barred by res judicata.

AFS's proposed presentation is evidenced by the cue cards that are attached to the complaint. The parties have agreed in their statement of material facts that the cue cards in Exhibit E of the complaint constitute substantially all of AFS's presentation. Cards 1 through 23 are clearly educational and instructional in nature, and it is permissible to convey this information at AFS's group demonstrations. Cards 24 through 31 relate to guarantee and payment plans offered to the students. These cards constitute solicitation of sales, and Penn State may constitutionally

prohibit AFS from presenting this information as a part of its demonstrations. The material contained in cards 32 through 36 is informational and permissible. The material in the first paragraph of card 37 deals with the price of AFS's goods, and constitutes impermissible solicitation. The material contained in the remainder of card 37 and cards 38 through 51 is instructional and permissible. The material contained in cards 52 through 65, as well as those portions of cards 66 and 67 that involve distribution of contracts for purchase of AFS goods, involves impermissible solicitation.

The only portions of AFS's demonstration that are at issue in this segment of the lawsuit are those which the Court has found to be impermissible pursuant to the Court of Appeals's ruling in *American Future Systems I.* Since there is no issue as to any material facts, summary judgment is appropriate. The Court will therefore enter summary judgment in favor of Defendants as to this issue.

II. **Plaintiffs Brubaker and Wingert.**

Defendants first assert that the claims of Brubaker and Wingert are moot because Wingert has withdrawn from the university and Brubaker has not renewed his contract for a university dormitory room during the upcoming academic year. Plaintiffs, in an apparent attempt to solve the "mootness" problem, on August 31, 1981, filed a motion to join an additional Plaintiff. The proposed Plaintiff, Kevin Graves, is a present Penn State student who resides in a Penn State residence hall and who has notified Penn State of his intention to hold an AFS demonstration in his dormitory room on September 14, 1981. (Affidavit of Kevin Graves at pp. 1-2). Graves has not, to the Court's

knowledge, been denied permission to hold the AFS demonstration in his dormitory room. (Memorandum of Law in Support of Plaintiffs' Motion to Join Kevin Graves as an Additional Plaintiff at p. 2.) Since Graves has not yet been denied permission to hold the AFS demonstration, the Court doubts whether his dispute with Penn State is sufficiently ripe for the Court to adjudicate his claim. However, the Court will not dismiss Brubaker's and Wingert's claims on mootness grounds. Graves's claims will not materially alter the facts of this dispute and the Court will today dismiss the entire lawsuit. Therefore, the Court will consider the facts in the light most favorable to Graves and will grant Plaintiffs' motion that Graves be added as an additional Plaintiff. Graves's claims will be treated as identical to those of Brubaker and Wingert.

The definition of mootness is well settled: A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome of the lawsuit. Powell vs. McCormack, 395 U.S. 486, 496 (1969). Despite this definition, a claim is not moot even though the alleged violation is not presently in force or continuing, where the alleged violation or challenged conduct is capable of repetition, yet evading review. Southern Pacific Terminal Co. vs. ICC, 219 U.S. 498 (1911); Winsett vs. McGinnis, 617 F.2d 996, 1003 (3d Cir. 1980); *cert. denied, sub nom.*, Anderson vs. Winsett, ____ U.S. ____ 101 S.Ct. 891 (1981). Where individual Plaintiffs are suing, and there is no class action, the capable of repetition, yet evading review doctrine is limited to the situation where (1) a challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again. Weinstein vs. Bradford, 423 U.S. 147, 148-49 (1975), *citing* Sosna vs. Iowa, 419 US. 393 (1975). As defendants

point out in their reply brief, the "capable of repetition yet evading review" doctrine is inapplicable if there is no reasonable expectation that the *same* Plaintiffs will be subject to the *same* policies again. (Defendants' Reply Brief at p. 5).

In order for the Court to grant summary judgment in favor of Defendants as to Plaintiffs Brubaker's and Wingert's claims, there must be no material issue of fact in dispute. As to Brubaker, Defendants claim there is no possibility that he will again be subject to Penn State's policies because Brubaker has not applied for dormitory space in 1981 and all rooms have previously been assigned to students making timely applications. Thus, Defendants conclude Brubaker will no longer be able to reside in a dormitory room, so his claim is moot. However, Plaintiffs deny that the dormitories are filled for the 1981-82 school year, so a material issue of fact exists as to whether Brubaker again will be able to live in a Penn State residence hall. Thus, a question remains as to whether Brubaker again will be subject to Penn State's policies regarding commercial transactions in residence halls. Therefore, at least at this stage of the litigation, summary judgment may not be granted in Defendants' favor as to Brubaker's claims on mootness grounds.

As to Plaintiff Wingert, Defendants claim that since he is no longer a student at Penn State and he has not filed an application for readmission to the school, Wingert too will no longer be residing in a Penn State dormitory room, so his claim is not capable of repetition. Again, there is a material issue of fact in dispute. Wingert, by affidavit, states that he intends to re-enroll in Penn State as soon as possible and intends to live in the Penn State residence halls. Thus, as with Brubaker, Wingert's claims cannot be disposed of in Defendants' favor on mootness grounds, at least at this stage of the litigation.

Defendants are entitled to summary judgment as to Brubaker and Wingert on other grounds. Brubaker and Wingert seek relief permitting them to invite AFS representatives to common areas in the individual dormitory rooms, to conduct sales demonstrations to groups of invited students in their rooms and in common areas of residence halls, and to invite AFS personnel to their dormitory rooms for the purpose of consummating sales of goods to other students following the demonstrations. Brubaker and Wingert were not parties to *American Future Systems I,* and are not bound by the doctrine of res judicata by the decision in that case. However, *American Future Systems I* constitutes binding legal precedent insofar as the legal issues involved are concerned. This Court in *American Future Systems I* did not address the question of First Amendment rights of Penn State students who are desirous of receiving information about the products which AFS sells and concluded that AFS did not have standing to assert the rights of those students. *American Future Systems I,* 464 F.Supp. at 1259. AFS again raised the claim that the First Amendment rights of Penn State students were being violated by Penn State's policy with regard to commercial activities within dormitories on its appeal in *American Future Systems I.* The Court of Appeals, addressing that claim, stated that "[t]he analysis contained in the text [of *American Future Systems I*] concerning the legitimacy of the restriction on AFS group sales in the residence halls applies as well to students who desire to purchase AFS products at group meetings. Also, we reiterate that the Penn State policy does allow an individual student to invite a sales representative into his or her room for the purpose of individually purchasing goods." *American Future Systems I,* 618 F.2d at 257, n. 16. To the extent that Brubaker and Wingert base their First Amendment claims on the right to conduct the same

types of demonstrations and sales that AFS seeks to conduct, they stand in no different position than AFS itself did in *American Future Systems I.* Indeed, Plaintiffs are in agreement with this position, stating that the student Plaintiffs' commercial free speech rights as listeners are reciprocal to AFS's rights, and *American Future Systems I* controls. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 13.) Since the Court of Appeals in *American Future Systems I* upheld the validity of Penn State's policy with regard to commercial activities in dormitories, and since Brubaker and Wingert stand on the same footing as did AFS, Penn State's policies do not violate Brubaker's and Wingert's First Amendment rights of commercial speech and Defendants will be granted summary judgment on this issue.

Brubaker and Wingert also assert that Penn State's regulations unconstitutionally inhibit their right of freedom of association arising under the First Amendment. Brubaker and Wingert claim that they have a fundamental right to associate themselves with one another and with AFS representatives in the setting of a group demonstration of AFS merchandise where all of them have the opportunity to hear and exchange information and views relating to AFS products, the effectiveness and fairness of the presentation, relevant price information, and also to consummate sales, if any one so chooses. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at pp. 17-18). Brubaker and Wingert claim that Penn State's regulations infringe upon those associational rights. Brubaker and Wingert also claim that since the private dormitory room serves as a student's "home away from home," and the rooms are essentially equivalent to the "interior of a private home," the state lacks the power to control legal, non-destructive, freely formed associations within such rooms. (Plaintiffs' Brief

in Opposition to Defendants' Motion for Summary Judgment at p. 19.)

Plaintiffs conclude that since Penn State has failed to demonstrate a compelling state interest to sustain enforcement of its regulation on commercial activities in the dormitories, Penn State's regulations must fall.

While Plaintiffs make the argument that their associational rights stand on some different footing than their right as recipients of commercial speech, the Court is unpersuaded by this distinction. Indeed, as set forth in the Complaint, these associational rights are indistinguishable from the rights sought with respect to making group demonstrations and sales in dormitory rooms. In Count III of the Complaint, Plaintiffs list in broadside fashion their rights that have allegedly been violated: "[D]efendants have deprived said Plaintiffs of their rights of freedom of speech, privacy, and association under the constitution of the United States." Certainly, the primary purpose of the demonstrations is to encourage the attendees at the shows to purchase, merchandise. *See American Future Systems I,* 464 F.Supp. at 1258 (¶ 58).

The Court finds unpersuasive Plaintiffs' argument that since the Court of Appeals stated that Penn State had only a "legitimate interest" in continued enforcement of its regulations and not a "compelling interest" Brubaker's and Wingert's associational rights have been violated. (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 20.) Where political-type relationships are impinged upon by regulation of the right to association, such regulation must be supported by a compelling state interest. *E.g.* NAACP vs. Alabama, 357 U.S. 449, 460 (1958). (Whether the beliefs sought to be advanced are political, religious, economic or cultural is immaterial). As is the case with commercial speech, commer-

cial associational rights, even those which are economically motivated, are afforded some protection under the First Amendment. *E.g.* International Union vs. National Right to Work Legal Defense & Education Foundation, 590 F.2d 1139, 1148 (D.C. Cir. 1978). The Plaintiffs cite no authority for the proposition that commercial associational rights such as those which are at issue in this case are on equal footing with political associational rights. Quite to the contrary, the relationship between political and commercial associational rights is analogous to the relationship between political and commercial speech rights. As the Supreme Court held in Ohralik vs. Ohio State Bar Association, 436 U.S. 447, 455-56 (1978), commercial and political activities must be treated differently.

> We have not discharged the "common sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech . . . . To require a parity of constitutional protection for commercial and non-commercial speech alike would invite dilution, simply by a levelling process, of the force of the [First] Amendment's guarantees with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

In *Ohralik*, the Court expressly held that commercial associational rights, while entitled to some constitutional protection, are subject to regulation in furtherance of im-

portant state interests. 436 U.S. at 458-59. *See* Central Hudson Gas & Electric Corp. vs. Public Service Commission of New York, ____ U.S. ____, 100 S.Ct. 2343 (1980); Virginia State Board of Pharmacy vs. Virginia Citizens Consumer Counsel, 425 U.S. 748 (1976).

The Court of Appeals has already held in *American Future Systems I* that legitimate and important interests of Penn State are furthered by its policy of governing commercial activity in the dormitories. Penn State asserts that AFS group sales significantly affect the primary activities of college dormitories. Penn State argues that its residence halls are exclusively dedicated to providing a living environment which is conductive to activities associated with being a student and succeeding academically and that AFS's activity within the residence halls will disrupt the proper study atmosphere and privacy of students. These interests are important enough to sustain Penn State's policy as against a challenge based on the right of association. *American Future Systems I*, 618 F.2d at 256-57.

Moreover, the Court fails to see how the restrictions imposed on Brubaker and Wingert infringe in any material way on the right to associate. As indicated above, Brubaker and Wingert may engage in sales demonstrations in common areas, and may consummate sales in the rooms of people purchasing the products. Brubaker and Wingert are of course free to conduct more extensive commercial activities at locations other than the dormitory halls of Penn State. Given the close nexus between associational freedoms and freedom of speech, NAACP va. Alabama, 357 U.S. 449, 460 (1958)), Brubaker and Wingert cannot demonstrate that the policy governing commercial activity violates their associational rights. The Defendants will therefore be granted summary judgment on this issue.

Brubaker and Wingert also claim that Penn State's regulations impermissibly infringe on their constitutional right of privacy, which they assert requires that they be permitted to conduct the commercial activity they desire in the dormitory rooms. Brubaker and Wingert state that they seek to establish their rights to be let alone in their choice of whom they may invite to their rooms, or whom they choose to visit, in a lawful, nondisruptive manner. Brubaker and Wingert argue that because the privacy and associational rights are so closely intertwined in this case, if the regulations cannot withstand scrutiny with respect to associational claims, the regulations must fall on privacy grounds for the same reasons. (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at pp. 23-24.) The Court agrees with these Plaintiffs' statement that privacy and associational rights should be treated equally in this case, but concludes that neither associational *nor* privacy rights have been violated. *See* Ohralik vs. Ohio State Bar Association, 436 U.S. 447, 455-56 (1978).

While the genesis of privacy rights is somewhat obscure, Griswold vs. Connecticut, 381 U.S. 479 (1965), a fundamental right to be free from unwanted governmental intrusions is implicit in the constitution. Roe vs. Wade, 410 U.S. 113 (1973); Stanley vs. Georgia, 394 U.S. 557, 564 (1969). It is equally true that the constitutional right of privacy extends to a college dormitory room, Piazzola vs. Watkins, 442 F.2d 284, 289-90 (5th Cir. 1971), as a college dormitory room is the equivalent of a student's "home away from home," *American Future Systems I,* 464 F.Supp. at 1262, and dormitory rooms are compared with the "interior of a private home," Brush vs. Penn State, 489 Pa. 243, 414 A.2d 48, 51 (1980).

The fact that students have privacy interests in their dormitory rooms, however, merely begins the inquiry. The

Supreme Court has recognized two kinds of privacy that are constitutionally protected. The first protects the individual from disclosure of certain matters and the second protects the individual from unwarranted governmental intrusion when the individual seeks to make certain personal decisions. Whalen vs. Roe, 429 U.S. 589, 599-600 (1977). Only the latter interest is relevant in this case. That interest, however, has been restricted to so-called fundamental matters "relating to marriage, procreation, contraception, family relationships, child rearing, and education." Paul vs. Davis, 424 U.S. 693, 713 (1976). The Plaintiffs, in apparent recognition of the fact that privacy rights established by Supreme Court decisions do not extend to the facts of this case, state that "the fact that certain aspects of the student-plaintiffs' privacy claims have not previously been considered and recognized by the Supreme Court does not preclude such recognition, by this Court." (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 24.) This case does not involve some intrusion into Brubaker's and Wingert's ability to make decisions about personal matters of a fundamental nature; nor does Penn State's policy preclude personal relationships, since it affects only relationships for commercial purposes at certain locations. Further, it is not apparent how the shifting of a group demonstration from a dormitory room to a common area imposes any infringement at all upon Brubaker's and Wingert's freedom of thought, action, or belief. Moreover, any conception that privacy doctrines include the right to invite ten or more persons into one's room for a commercial demonstration is inconsistent with the notion of the "right of privacy" under Supreme Court case law. For these reasons, the Court declines Plaintiffs' invitation to expand the right of privacy in this case. Since Defendants have shown that, as a matter of law, Plaintiffs' right of privacy has not been violated by Penn State's policy regarding commercial ac-

tivities in dormitories, Defendants will be granted summary judgment as to this aspect of the case.

Brubaker and Wingert also claim that Penn State's policies abridge their rights under Pennsylvania Landlord and Tenant Law. Under § 504-A of the Landlord-Tenant Act, 68 P.S. § 250.554 (Supp. 1981), a tenant has the right to invite to his apartment or dwelling units such employees, business visitors, tradesmen, deliverymen, suppliers of goods and services, and the like as he wishes. Further, the tenant has the right to invite to this dwelling for reasonable periods of time social guests, family members and visitors. "It is the intent of this article to insure that the landlord may in no way restrict the tenant's right to purchase goods, services and the like from the source of the tenant's choosing . . ." 68 P.S. § 250.554. There is some controversy as to whether Pennsylvania's Landlord-Tenant Act is applicable to Penn State's dormitories. Even assuming that the Act is applicable to Penn State's dormitories, Brubaker and Wingert have not demonstrated that Penn State's regulations with regard to commercial activities in its dormitories violates the Act. Penn State does not prohibit Brubaker and Wingert from inviting an AFS representative to their rooms to make a sale. Penn State also does not prohibit Brubaker and Wingert from having social guests in their dormitory rooms. No reasonable construction of the Landlord-Tenant Act leads to the conclusion that Brubaker and Wingert are permitted to engage in broad commercial transactions in Penn State's dormitories. Thus, as a matter of law, Brubaker's and Wingert's rights under Pennsylvania's Landlord-Tenant Act have not been violated. Summary judgment will therefore be granted to Defendants on this issue.

III. **Plaintiff's DelValle, Varsics, Habacher, and Spiller.**

DelValle, Varsicks, Habacher and Spiller are Penn State students who do not reside in Penn State residence halls. They seek an order permitting them to attend and participate in AFS group presentations in common areas and dormitory rooms and to consummate sales from AFS in those rooms. (Complaint, Count IV.) These Plaintiffs were allegedly invited by Brubaker and Wingert to attend AFS demonstrations in private dormitory rooms. When Penn State ordered that these demonstrations not take place, on the ground that they were violative of Penn State's regulations regarding commercial activities in dormitories, these Plaintiffs claimed that their right to attend those demonstrations was violated.

In *American Future Systems I,* the Court of Appeals recognized that the First Amendment rights of the recipients of commercial speech are co-extensive with those of the speaker. *American Future Systems I,* 618 F.2d at 257 and 257 n. 16. The restriction on these Plaintiffs' ability to engage in commercial activity is even less than that placed on Brubaker and Wingert. The non-resident Plaintiffs are able to participate in an AFS demonstration in a common area of the residence hall but not in a dormitory room. Moreover, they might consumate a purchase of AFS goods anywhere except in a residence hall. It is presumed that Penn State cannot and does not prohibit these Plaintiffs from inviting an AFS representative to their own dwellings for demonstrations and sales. Thus, the Court fails to see how Penn State's regulations limiting commercial activities in its dormitories constitute any significant abridgement of these Plaintiffs' rights of speech, privacy, and association. Since these Plaintiffs have available all the alternative means of access to information about AFS products, the inconsequential restrictions imposed by

Penn State's regulations cannot be considered to be violations of these Plaintiffs' First Amendment rights. Linmark Associates, Inc. vs. Willingboro, 431 U.S. 85, 93 (1977). Reid vs. Barrett, 467 F.Supp. 124, 128 (D. N.J. 1979), *aff'd* 615 F.2d 1354 (3d Cir. 1980); Connecticut State Federation of Teachers vs. Board of Education Members, 538 F.2d 471, 479 (2d Cir. 1976). Defendants are therefore entitled to summary judgment as to these Plaintiffs' claims.

IV. Arbitrary Enforcement of Penn State's Regulations.

Plaintiffs' final claim is that Defendants in violation of Plaintiffs' due process rights, have not enforced the challenged regulations in an even-handed, fair, and non-arbitrary manner. Plaintiffs argue in support of their due process claim that Wolff vs. McDonnell, 418 U.S. 539, 558 (1974), stands for the proposition that "the touchstone of due process is protection of the individual against arbitrary action of government." *See also* Chung vs. Park, 514 F.2d 382, 387 (3d Cir. 1975).

As Plaintiffs admit, "of course, the predicate of a due process claim is governmental violation of a person's liberty interest." (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at p. 26, *adopting* Plaintiffs' Memorandum of Law in Support of Motion for a Preliminary Injunction at pp. 34-35.) It is certainly the case that were it established that Plaintiffs' constitutional rights of free speech, association and privacy were violated by Penn State's enforcement of its regulation regarding commercial activity in dormitories, this violation of Plaintiffs' rights would be within the zone of protected interest under the Fourteenth Amendment. *E.g.* Madera vs. Board of Education, 386 F.2d 778, 783-84 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968), *citing* Allgeyer vs. Loui-

siana, 165 U.S. 578 (1897). However, the Court has found that Penn State's enforcement of its dormitory regulations does not violate any of Plaintiffs' collective constitutional rights or rights under Pennsylvania state law. Thus, even if Penn State's regulations were enforced in an arbitrary manner Plaintiffs' due process rights would not have been violated.

In addition, Plaintiffs' complaint and supporting affidavits over insufficient facts to support a claim of discriminatory enforcement of Penn State's policies. In this circuit, civil rights complaints must set forth facts with specificity, Rotolo vs. Borough of Charleroi, 532 F.2d 920, 922 (3d Cir. 1976), and this complaint fails to do so. Plaintiffs, in a conclusory manner, in Count II of their complaint, state that "by enforcing their stated policy, which purports to exclude from university residence halls all persons seeking to demonstrate or sell merchandise, in an arbitrary, capricious, selective, discriminatory, and unreasonable manner, Defendants have deprived Plaintiffs of their rights to due process under the Fourteenth Amendment of United States Constitution." (Complaint, Count II). The sole evidence now advanced in support of its allegation is the affidavit of Joseph Healey, which states in part:

> Ms. Peterson explained that the University cannot monitor the residence halls at all times. Therefore, there may be illegal presentations going on that the University does not know about. However, when the university becomes aware of an illegal presentation through a student complaint or other means, they enforce the rule.

This hardly establishes arbitrary and capricious enforcement of Penn State's policies. Indeed, it appears to establish consistent enforcement of the policies as soon as

the university is made aware of violations of its rules. Since Plaintiffs have failed to state a claim upon which relief can be granted with respect to this due process claim, summary judgment will be granted in Defendants' favor on this issue.

V. Conclusion.

The Plaintiffs have not established that Penn State's enforcement of its regulations with regard to commercial activity in its dormitories violates any of the Plaintiffs' constitutional rights or rights under Pennsylvania state law. Since there is no dispute of any material issue of fact in this case, Defendants' motion for summary judgment will be granted.

An appropriate order will be entered.

MUIR, U.S. District Judge

DATED; September 16, 1981

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	
Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed
	:	2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

1. Graves's motion to be joined as an additional Plaintiff is granted.

2. Defendants' motion for summary judgment is granted.

3. The Clerk of Court shall enter judgment in favor of all Defendants and against all Plaintiffs.

4. The Clerk of the Court shall close this file.

MUIR, U.S. District Judge

DATED: September 16, 1981

FILED
WILLIAMSPORT, PA.
SEP 16 1981
DONALD R. BERRY, Clerk
PER.....
DEPUTY CLERK

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al., Plaintiffs	:	Civil No. 81-0171
v.	:	Complaint Filed 2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al., Defendants	:	(Judge Muir)

JUDGMENT

This issues having been duly reviewed by the Honorable Malcolm Muir, United States District Judge, and a decision having been rendered this date thereon.

It is Ordered and Adjudged that a declaratory judgment be and hereby is entered as follows:

Paragraph 3 of the "Regulations for the Solicitation of Money or the Sale or Solicitation of Products or Services in University Residence

Halls" promulgated November 19, 1982 is unconstitutional.

Dated at Williamsport, Pennsylvania this 5th day of August, 1981.

/s/ Donald R. Berry
Donald R. Berry
Clerk of Court

by:

/s/ Sylvia Lehotsky
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC. et al., Plaintiffs	:	Civil No. 81-0171
vs.	:	Complaint Filed 2/5/81
THE PENNSYLVANIA STATE UNIVERSITY, et al., Defendants	:	(Judge Muir)

ORDER

1. Defendants John W. Oswald, M. Lee Upcraft, The Board of Trustees of the Pennsylvania State University, Pennsylvania State University, and its employees and agents, are hereby permanently enjoined from enforcing Paragraph 3 of the "Regulations for the Solicitation of Money or the Sale or Solicitation of Sale of Products or Services in University Residence Halls" promulgated November 19, 1982, with respect to Kevin Graves and Kathy Johnson.

2. The Clerk of Court shall enter a declaratory judgment that Paragraph 3 of

the "Regulations for the Solicitation of Money or the Sale or Solicitation of Sale of Products or Services in University Residence Halls," promulgated November 19, 1982 is unconstitutional.

/s/ Muir
MUIR, U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	Civil No. 81-0171
Plaintiffs	:	Complaint Filed 2/5/81
vs.	:	Remanded 10/1/82
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

1. The motion of the Plaintiffs for leave to present additional relevant information to the Court is denied.

2. The motion of the Plaintiffs to file supplemental findings of fact is granted.

3. The motion of the Plaintiffs for a preliminary injunction is granted in part and denied in part.

4. The motion of Kevin Graves for a preliminary injunction is granted.

5. The request of all other Plaintiffs for preliminary injunctive relief is denied.

6. Pending final hearing or further order of this Court, Defendants John W. Oswald, M. Lee Upcraft, the Board of Trustees of the Pennsylvania State University, Pennsylvania State University, and its employees and agents, are hereby enjoined from enforcing Paragraph 3 of the "Regulations for the Solicitation of Money or the Sale or Solicitation of Sale of Products or Services in University Residence Halls," promulgated November 19, 1982, with respect to Kevin Graves, the only named individual student Plaintiff who resides in Penn State's residence halls.

7. This case is hereby placed on the Williamsport July 1983 trial list for disposition on the merits.

8. A settlement conference will be held in this case in Williamsport on Wednesday, June 1, 1983, at a time to be announced.

9. All discovery in this case shall be completed on or before June 15, 1983.

10. A final pre-trial conference will be held in this case in Williamsport on Tuesday, July 5, 1983.

11. Juries will be drawn in Williamsport on Wednesday, July 6, 1983 for those cases on the July 1983 list to be tried by a jury.

/s/ Muir
MUIR, U.S. District Judge

DATED: December 21, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al	:	Civil No. 81-0171
	:	Complaint Filed 2/5/81
vs.	:	Remanded 10/1/82
THE PENNSYLVANIA STATE UNIVERSITY, et al	:	(Judger Muir)

ORDER

AND NOW, this 10th day of January, 1983, it is hereby ORDERED that Plaintiffs' Motion To Amend Opinion Dated December 21, 1982 is GRANTED.

The Opinion of this Court dated December 21, 1982 is hereby AMENDED as follows:

At page 28 of the Opinion, line 19, the word "effective" is amended to read "ineffective".

BY THE COURT:

/s/ Muir
J.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

AMERICAN FUTURE SYSTEMS, INC., et al.,	:	Civil No. 81-0171
Plaintiffs	:	Complaint Filed 2/5/81
vs.	:	Remanded 10/1/82
THE PENNSYLVANIA STATE UNIVERSITY, et al.,	:	(Judge Muir)
Defendants	:	

ORDER

February 15, 1983

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On February 11, 1983, an error was brought to the Court's attention in the opinion of this Court dated December 21, 1982.

NOW, THEREFORE, IT IS ORDERED THAT:

The opinion of this Court dated December 21, 1982 is hereby amended as follows:

At page 14 of the opinion, line 4, the words "Marital Status" are added after the words "Category III -- Codes of".

/s/ Muir
MUIR, U.S. District Judge

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 83-3412

AMERICAN FUTURE SYSTEMS, INC., STEVEN BRUBAKER, RICHARD J. WINGERT, W. BRUCE DEL VALLE, JOAN D. VARSICS, DENNIS C. HABECKER, KEVIN GRAVES and KATHY JOHNSON,
Appellees

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD and M. OSWALD AND M. LEE UPCRAFT,
Appellants

Appeal from the Declaratory Judgment and Order Entered August 5, 1983 in the United States District Court for the Middle District of Pennsylvania at No. 81-0171

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES FOUNDATION OF PENNSYVLANIA

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Attorney for Amicus Curiae American Civil Liberties Foundation of Pennsylvania

speech, to be constitutional must meet three requirements: (1) it must be justified by a substantial state interest, (2) it must directly advance that state interest and (3) it must be no more extensive than is necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 564-66. *See also Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 (1983).

Penn State's solicitation regulations do not meet these First Amendment standards. Penn State's regulations expressly prohibit students from gathering in their own dormitory rooms to receive commercial information[1] and thus clearly restrict their rights of freedom of speech.[2] Penn State has not merely regulated purchases in a group setting, but has also prohibited communication of commercial information in the absence of actual sales. The regulations define solicitation to include "any demonstration, explanation or distribution of literature in a residence hall concerning products or services which are for sale" or any attempt to organize such a demonstration, in addition to solicitation of money or actual sales. The AFS presentations prohibited by the regulations include demonstrations of its products and information regarding the prices and terms

---

[1] Indeed, contrary to Penn State's contention that the speech and associational rights affected by the regulations "must be characterized as purely commercial" because "the regulation prohibits only the solicitation and sale of products and services" (Appellant's Brief at 28), the solicitation regulations clearly also restrict political expression. Paragraphs 2 and 3 of the regulations expressly prohibit solicitation of money and sales by any "person (including a student), . . . charitable organization, religious organization or other organization." The regulations thus would prohibit not only commercial speech and transactions, but such activities as sale of political buttons or t-shirts for contributions at a political meeting in a student's domitory room or charitable or political fund-raising gatherings in the rooms of students who wished to conduct such activities. Political and charitable solicitation and contributions, however, are political speech and association accorded the highest protection under the First Amendment, not commercial speech, notwithstanding that money is involved. *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 628-33 (1980); *Buckley v. Valeo*, 424 U.S. 14-16, 24-25 (1976).

[2] Penn State's claim that the fact that the speech prohibited by its regulations is in the form of an in-person demonstration rather than a written advertisement makes its only marginally subject to First Amendment protection is without merit. The First Amendment protection afforded to commercial information applies not only to advertising but to the information itself, even if it is communicated by other means. *AFS II*, 688 F.2d 907, 913 (3d Cir. 1982).

CONCLUSION

For the foregoing reasons, the American Civil Liberties Foundation of Pennsylvania submits that the judgment of the court below should be affirmed.

Respectfully submitted,

/s/ Virginia Lynn Hogben

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Dated: December 14, 1983

Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1734

IN THE

Supreme Court of the United States

October Term, 1984

KATHY JOHNSON,

Petitioner,

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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June 3, 1985

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Did the Court of Appeals correctly determine that the demonstration and sale of cookware was commercial speech under the criteria of *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)?

Did the Court of Appeals correctly apply *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557 (1980) in holding that Penn State's policy of prohibiting group commercial sales demonstrations in an individual student's dormitory room did not violate the First Amendment?

PARTIES TO THE PROCEEDING

The Respondents are The Pennsylvania State University ("Penn State"), John W. Oswald, the President of Penn State at the time the complaint was filed, and M. Lee Upcraft, Director of Residential Life Programs at Penn State.

Penn State is a nonprofit corporation existing under Pennsylvania laws governing nonprofit corporations. It has no parent, subsidiary or affiliate corporations.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-1734

KATHY JOHNSON,

Petitioner,

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

BRIEF IN RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF THE CASE

The Pennsylvania State University ("Penn State") owns and operates residence halls occupied by approximately 13,000 students. Penn State has a policy which prohibits a student from using his or her residence hall room to solicit sales and to sell goods and services to others. The interests supporting Penn State's policy are accurately stated by the Court of Appeals. Penn State seeks to preserve its residence halls for their intended uses, and prevent them from

becoming "rent free merchandise marts" used by commercial vendors for the sale of merchandise. It also seeks to maintain an atmosphere conducive to study and other normal activities associated with student life. (Petition for Writ of Certiorari ("Petition") 20a; *American Future Systems, Inc. v. The Pennsylvania State University,* 752 F.2d 854, at 863 (3rd Cir. 1984).)

American Future Systems, Inc. ("AFS") is a corporation in the business of selling cookware, china, crystal and silverware. Its sales techniques are fully described in the Court of Appeals' opinion (Petition, 4a-6a, 752 F.2d at 856-57). AFS contacts a college student, usually a woman, and asks if she will host a demonstraiton in her residence hall room. If the student agrees, ten to fifteen other students are asked to attend. An AFS sales representative conducts a demonstration of AFS products and attempts to convince the students to sign credit purchase agreements for merchandise. Inducements such as a "free" vacation trip to Florida or Las Vegas are used to obtain a host for the sales demonstration and solicit attendees.

Under Penn State's policy, a student's residence hall room cannot be used for this purpose. Students, and companies such as AFS, do have ample alternative means of purchasing and selling goods and services. As the Court of Appeals pointed out, Penn State permits commercial vendors to conduct a one-on-one demonstration and sale in that student's room. Telephone and mail solicitations are permitted; advertising in the student newspaper and radio station is available; and commercial vendors can rent space from Penn State at the Nittany Lion Inn, an on-campus hotel, to do precisely what AFS does in its sales demonstrations. (Petition 27a, 752 F.2d at 867).

AFS and a group of student plaintiffs brought this ac-

tion in 1981, challenging Penn State's policy on First Amendment grounds. (In a prior action brought by AFS in 1977, principally involving the common areas of Penn State's residence halls, the Third Circuit Court of Appeals had previously upheld Penn State's policy. *American Future Systems, Inc. v. The Pennsylvania State University,* 618 F.2d 252 (3rd Cir. 1980)). The present litigation culminated in the decision of the Court of Appeals holding that Penn State's policy did not violate the First Amendment. It determined that the speech in question was commercial speech, based upon *Bolger v. Youngs Drug Products Co.,* 463 U.S. 60 (1983). It then applied the four-part test of *Central Hudson Gas & Electric Co. v. Public Service Commission of New York,* 447 U.S. 557 (1980), and concluded that the governmental interests asserted by Penn State were directly advanced by the regulation, and that the regulation was not excessive in light of the state's interest. (Petition, 24a-25a, 752 F.2d at 865-866).

AFS, although a plaintiff throughout the proceedings below, has not joined in the Petition for Writ of Certiorari. Petitioner Kathy Johnson was joined as a plaintiff after the trial, and is presently the only individual plaintiff who is a student at Penn State.

ARGUMENT

1. The Court of Appeals' Decision is consistent with decisions of this Court.

The threshold determination of the Court of Appeals was the applicable level of First Amendment scrutiny because it recognized that "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger v. Youngs Drug Products Corp.,* 563 U.S. 60, at ____ (1983). In

Bolger, this Court identified three characteristics which, taken together, strongly supported the conclusion that the speech in question was commercial: the speech was concededly advertising, a specific product was referenced and the speaker had an economic motivation. 463 U.S. at ____, 103 S.Ct. at 2880.

The same three characteristics are present in an AFS demonstration. The content is advertising, specific products are described and AFS has an economic motive in making the presentation. On this basis the Court of Appeals properly concluded that the speech in question was commercial. Petitioner's claim that *Bolger* is distinguishable because the AFS demonstration is "invited" speech is incorrect both legally and factually. The *Bolger* analysis looked at the nature of the speech, not whether it was invited or uninvited. The facts here, moreover, plainly show that it is AFS which makes the initial contact to secure a host for the demonstration, followed by the solicitation of guests. The "invitation" comes only at the request of AFS. Nor does *Bolger* suggest, as the Petitioners do, that commercial speech is transformed into pure speech whenever the recipient listens for non-commercial reasons. Under the Petitioners' view, an advertisement for cookware could change from commercial to pure speech and back again depending solely upon what the recipient was thinking at the moment. This proposition would stand commercial speech analysis on its head.

The Court of Appeals then considered the validity of Penn States' policy under the test set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York,* 447 U.S. 557 (1980). It recognized that both the *Central Hudson* test for restrictions on commercial speech, and the test for speech on government-owned

property, had some applicability to Penn State's regulation. The test established for evaluating restrictions on government-owned property which, like a Penn State residence hall, is a non-public forum is whether the restriction is reasonable and not an effort to suppress expression on the basis of opposition to the speaker's views. *Perry Education Association v. Perry Local Educators Association,* 460 U.S. 37 (1983); *United States Postal Service v. Council of Greenburg,* 453 U.S. 114 (1981); *Green v. Spock,* 424 U.S. 828 (1976); *Adderly v. Florida,* 385 U.S. 39 (1966).

The Court of Appeals applied the more rigorous test of *Central Hudson* and found the restriction to be valid. First, the Court determined that the speech concerned lawful activity. It then concluded that Penn State's interest in preventing vendors from using Penn State residence halls as rent free merchandise marts, taken together with its interest in maintaining a residential atmosphere conducive to study, was substantial. In light of the number of students living in Penn State residence halls, the close quarters in which they reside and the vendors of innumerable products and services which would find this a tempting market, the Court found that the restriction directly furthered these interests. Finally, in considering the last prong of *Central Hudson* analysis, the Court noted that it must consider whether the restriction was necessary given the effect of allowing *all* commercial vendors access to student rooms on the same terms, not just whether the restriction was necessary with respect to AFS alone. It held that the regulation was not excessive, particularly in light of the ample alternative channels of communication.

As Judge Adam's concurring opinion points out, virtually any mode of analysis brings the same result,

whether it be the non-public forum test in *Perry,* the time, place and manner test of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976) or the tests applied to regulations in a school environment in such cases as *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969). Further, Judge Sarokin's concurring opinion points out an alternative basis for the Court of Appeals' result. Because AFS demonstrations and sales involve deceptive speech and use of a credit policy found to discriminate on the basis of race and sex (*see, United States v. American Future Systems, Inc.,* 743 F.2d 169 (3rd Cir. 1984), the first prong of the *Central Hudson* analysis is not satisfied.

Petitioner's claim that the Court of Appeals misapplied *Central Hudson* is without merit. Contrary to Petitioner's assertion, the District Court made specific findings of fact as to the interests asserted by Penn State (Petition, p. 81a-83a, 94a, 95a, 553 F.Supp. 1268, at 1271, 1274, Nos. 26-38, No. 82). The District Court only differed with the Court of Appeals as to the legal significance of these interests. Nor did the Court of Appeals misinterpret the final prong of *Central Hudson* – that the regulation be no more extensive than necessary. The Court of Appeals applied this test in light of this Court's holding in *Clark v. Community for Creative Non-Violence,* ____ U.S. ____, 104 S.Ct. 3065 (1984), pointing out that its function was to determine whether Penn State's policy was an acceptable alternative among several, and not necessarily what the least restrictive type of regulation could be. Its conclusion was reinforced by the ample alternative channels available under Penn State's policy for the same communication.

Accordingly, the Court of Appeals' decision was entirely consistent with the decisions of this Court both with

respect to determining the nature of the speech and the validilty of the policy.

2. The Court of Appeals' Decision is limited in its effect.

No amount of rhetoric can expand the Court of Appeal's opinion beyond what it is on its face – a decision finding one policy at one University valid under the First Amendment. Its applicability to other colleges and universities would depend upon the terms of the specific policy, the nature of the forum and the activity sought to be conducted. All of these factors will vary, requiring lower courts to apply First Amendment principles to the specific facts of those cases. Therefore, this case does not present an issue of importance beyond its immediate effect upon the parties.

Penn State's residence hall policy does not by any means sweep as broadly as Petitioner now contends, and, in any event, the only aspect of the policy addressed by the Court of Appeals was its preclusion of group sales of cookware in students' rooms. The only fact as to the Petitioner, entered by stipulation, is that "she desired and continues to desire to host and/or attend the kind of demonstration conducted by Plaintiff American Future Systems, and which is precluded under University regulations." Whatever other aspects of the policy Petitioner now attacks, only the restriction on group commercial demonstrations was considered below.

CONCLUSION

For the above reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1984

KATHY JOHNSON,

Petitioner,

v.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

On a Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Third Circuit

MOTION OF THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. AND COMMONWEALTH ASSOCIATION OF STUDENTS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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May 28, 1985

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KATHY JOHNSON,

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To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 42 of the Rules of this Court, The Student Association of the State University of New York, Inc. (SASU) and Commonwealth Association of Students (CAS) respectfully move for leave to file the accompanying brief as amici curiae. Petitioners have consented to the filing of this brief: respondents have not.

INTEREST OF SASU AND CAS

SASU is a student run organization in the State of New York representing all full-time students attending the State University of New York higher educational system. In addition, the organization represents a substantial number of the students attending the community college system within the State University of New York. Total students represented are in the amount of approximately 50,000.

The organization was formed in 1972 and is designed to represent the interests of students attending the State University system through political, legislative and legal means.

The Commonwealth Association of Students (CAS) was formed in 1973 and represents the approximately 76,000 students attending the state colleges and universities in Pennsylvania. CAS is dedicated to serving the special political, social and economic interests of the students it represents. Organized, formed and controlled solely by students, CAS seeks to assure the individual rights of students as full and equal adult citizens and promote conditions conducive to academic freedom.

SASU and CAS in the instant case believe that the precedent set down by the Court of Appeals is incorrect as to the student's right to control access to his/her dormitory room and raises significant issues relative to student rights, both in Pennsylvania and the State of New York. It is believed by these student groups that Pennsylvania State University enforcement of the commercial regulations which preclude students from gathering together in the privacy of an individual student's dormitory room interferes with the student's First Amendment and Fourth Amendment rights and does not interfere with the privacy of non-participating students nor does it disrupt the study atmosphere of the residence hall. It is the organizations' belief that these regulations are unconstitutional and illegal and must, therefore, be striken.

Both organizations have substantial interests in the maintenance of a free atmosphere within the respective university systems and believes that the regulations not only restrict the freedom of speech of the students but are designed for the purpose of insuring the administration's control over the student

dormitory existence.

SASU and CAS, therefore, move for leave to file the accompanying brief as amici curiae.

Respectfully submitted,

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BRIEF OF THE STUDENT ASSOCIATION OF THE STATE UNIVERSITY OF NEW YORK, INC. AND COMMONWEALTH ASSOCIATION OF STUDENTS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36 of the Rules of this Court, The Student Association of the State University of New York, Inc. (SASU) and Commonwealth Association of Students (CAS) respectfully submit this brief as amici curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

INTRODUCTION

The issue presented is whether students attending Pennsylvania State University have the right to invite persons of their choice into their dormitory rooms or whether the university has the right to control access of invited guests, based on the content of the speech and the nature of the invited guest.

This case is for declaratory and injunctive relief on behalf of students attending Pennsylvania State University.

This case, presents an issue of whether Pennsylvania State University can control a student's dormitory room as well as to regulate the guests and the content of their speech. It poses a question not of solicitation but rather of whether a student dormitory room for the purpose of First Amendment rights is equivalent of a non-student's home.

The Court of Appeals focused on AFS in its analysis and indicated that for the purposes of construing the students claims a speech made by AFS is and remains commercial and the student's acquire no different or greater rights by virtue of the fact that they invite the AFS representative to the privacy of their own dormitory room.

The Panel concluded that as a matter of law the speech was to be judged by the *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) standard and that the outright ban on commercial speech by Pennsylvania State University was acceptable.

The decision below rejects the doctrine established in *Stanley v. Georgia*, 394 U.S. 557 in that it allows the university to control the content and nature of speech within an individual's dormitory room. Evidently, considering that a student's dormitory room is not the equivalent of the residency of a person who are not students, the effect of this decision is to retrogress to a time when the university was in loco parentis to students and to abrogate the most basic of student rights; the right to be secure within their own home from outside intrusion.

INTEREST OF THE AMICI CURIAE

The interests of SASU and CAS in this matter are set forth in the accompanying motion for Leave to File Brief as Amici Curiae.

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A. COMMERCIAL SPEECH IS PROTECTED TO THE LISTENER IN HIS/HER DORMITORY ROOM

The Court of Appeals for the Third Circuit rejects the idea that the student's right to control their own living space gives rise to a pure First Amendment issue. Rather the Court states that since AFS and the invited speech are of a commercial character the *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U. S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) test for commercial speech must govern. *AFS v. Penn State University*, 752 F.2d 854, 862 (1982)

The Court states that if the speech is commercial for the purposes of the giver, it cannot give rise to pure free speech and association rights of the listener[1] *AFS v. Penn State University*, supra. We disagree.

It is the position of the student groups urging reception of the petition that it is immaterial that the speech in this instance is commercial. What is material and what should govern this case is the location of the speech and the student's right to control that location and to receive the speech in the privacy of that location[2]

The Court of Appeal's focused on AFS and the commercial speech rather than on the issue of the locality of the speech and the student's rights within the dormitory room which should be the true nexus of the analysis.

If a student's dormitory room is akin to the student's home, then, like *Stanley v. Georgia*, speech is protected because of the location of the speech. While the Court of Appeals may be correct, and we do not concede this point, that speech once commercial stays commercial that did not address the issue before the Court - the the plaintiff's right to receive that speech, regardless of its character, within the privacy of her dormitory room: ". . . .free, except in very limited circumstances, from unwanted governmental intrusions into ones privacy". *Stanley v. Georgia, supra at 549*

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[1] *American Future Systems, Inc. v. Pennsylvania State University*, 752 F2d 854, 863 (1984)

[2] *AFS III*, 553 F. Supp. at 1282; *Piazzpola v. Watkins*, 442 F.2d 284, 289-90 (5th Cir. 1971); *Commonwealth v. McClosky*, 217 PA. Super. Ct. 432, 272 AD2d 271 (1970)

B. THE CHARACTER OF THE DORMITORY/STUDENT RELATIONSHIP

The student has First Amendment, Fourth Amendment and privacy rights in his/her dormitory room and does not give them up because he/she is a student. *Stanley v. Georgia*, 394 U.S. 557, 565, 22 L. Ed.2d 542, 549 (1969); *Griswold v. Connecticut*, 381 U.S. 471, 482, 14 L. Ed.2d 510, 513, 85 S. Ct. 1678 (1965)

In the university student relationship the traditional concepts of an individual's constitutional rights have been modified in recognition of the special role that education plays in the maturation process. *Moore v. Student Affairs Committee of Troy State University*, 284 F. Supp. 725, 729 (1968) This dimunition of students rights has been held to be in furtherance of the university's need to function as an educational institution. *Moore v. Student Affairs Committee of Troy State University* 284 F. Supp. at 730.

An educational institution such as a university has traditionally been thought of as a place for the free exchange of concepts, ideas and where communication can be had. The issue is whether the university, after requiring a student to reside in a dormitory as a condition of enrollment, can censor the student's access to outside information, communication, and can limit group discourse within the only space the student has — his/her dormitory room.

The Court below perceived the issue to be one revolving around American Future Systems, Inc. efforts to sell wares to students and was so offended by AFS that it ignored the actual issue being presented to that Court for review by the student plaintiff, not AFS.[3]

The student groups urge the Court to try to understand what it is like to live in a dormitory. Most students are compelled

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[3]The fact that the perception of the issues by the Court were influenced by a previous enforcement case heard by the Court of Appeals between the United States and AFS is demonstrated from the opening and permeates. Note the analysis of the Court relies on evidence not within the record of this case, but previously heard in the enforcement action. *U.S. v. AFS, Inc.*, 571 F. Supp. 551 (1983); aff'd 743 F2d 169 (Third Cir. 1984) Note footnotes 9 and 32 as well as the concurring opinion of Judge Sarokin.

to live in dormitories as a condition of obtaining a higher education. If a university, under the guise of controlling "disruption" has the right within student's dormitory rooms to censor speech that occupants engage in, control access to speakers and communication, limit the mode of give and take communication, then the student dormitory resident's right to higher education is more a right to limited access to information of the university's choice. Disruption, the justification for this policy used by Pennsylvania State University is not danger or disorder, it is loss of control and leverage over students by the administration.

The Court of Appeals in allowing itself to be carried away by the alleged reputation of AFS without considering the rights of the students placed itself in a position of condoning the university's prior restraint of the speakers and the content of the communication within the privacy of ones residence.

The issue is not whether a commercial enterprise has the right to visit the students, but the university's right to censor information, access to the information, and form of the information that the student *wishes* to receive in his/her dormitory room.[4]

It is clear that the Courts over time had been reluctant to intercede in affairs of educational institutions. T. Ross, *The University: The Anatomy Academe* 4 (1976) Only relatively recently, did the Courts, and to some extent, the Legislature, step in. *Burkins Developmental Law - Academic Freedman*, 81 Harvard Law Review 1045, 1148-52 (1968) This judicial intervention in support of academic freedom and student rights was to some extent based on the inevitable outcome of the enlargement of the public educational system where a college degree obtained an intrinsic economic value. *E. Hartford, Education in These United States*, 114-21 (1964)

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[4]Note in footnotes 3 and 30 the Court indicates that the university has the right to control activities within the dormitory room analogizing the university's right to do the same to a municipality's right to enact a zoning ordinance. This, of course, totally misfocuses the issue as a municipality's right to control zoning is not related to the activities that take place within the home.

In accordance with the development away from in loco parentis, Courts have indicated students are presumed to have sufficient maturity to handle their own personal affairs without intrusion by the university *Gunston v. Mills College of Oakland*, 41-1661 (Cal. Sup. April, 1971) cited in *M. Chambers, the College and the Courts* 106 (1972) as long as the dormitory is maintained as a environment consistent with the educational process, *Moore v. Student Affairs Committee of Troy University*, supra at 730. Recent cases in the absence of in loco parentis have moved more towards a landlord-tenant relationship explaining the dormitory/student residents life.[5]

Penn State University seeks to return students to the age of in loco parentis. Recent cases have recognized the dormitory room should be the bastian of the student, not the university, and that limitations placed on the student may only be acceptable if the student has a right to exercise his/her First Amendment rights within that bastian. *Harrell v. Southern Illinois University*, 457 N.E.2d 971, 978, (Ill. App. 5th Dist. 1983); *Chapman v. Thomas*, 743 F.2d 1056, 1059-1060 (1984)

The university, absent evidence of illegal or dangerous activity, should have no more right to control the association of people in student dormitory rooms than a landlord has over a tenant.

It is the content of the speech that is seeking to be regulated not the behavior of the students or the invited visitors. It is the students rights that are being violated not that of the invited vistor. These rights are being violated not for any tenable or

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[5]The courts receiving the landlord-tenant theory have attempted to differentiate the role of the educational institution as a landlord verses educational institution as to whether the university is performing a proprietary function, such as the supplying of living space. If a proprietary function is found, the courts have generally indicated that the university is a landlord. These analyses have basically been for the purpose of determining tort liability. *Preston v. State of New York*,. 59 NY2d 997, 998; *Bass v. City of New York*. 38 AD2d 407, 411 aff'd 32 NY2d 894; *Miller v. State of New York*. NY2d (1984) *Piazzola v. Watkins*. 442 F2d 284 (1971); *Commonwealth v. McClosky*. 217 PA. Super. Ct. 432, 272 AD2d 271 (1970)

justifiable reason[6] but rather because the university is seeking to keep the students at Penn State University in loco parentis to the university.[7] The university is seeking to ignore years of evolution in the relationship between institutions of higher learning and students.

One can imagine the consequences of allowing these regulations to continue. Implicit in the very regulation is the right of the university to review all speech to be made in the privacy of each student's room in order to determine whether it is of a acceptable nature by the university's own definition.[8] The student therefore is compelled to check with the university concerning his/her invited guests *and* the content of their communication prior to the invited visitation. Additionally, the university obstensively has the right to enter the student's dormitory room to verify and control the content of this communication and to verify that it is not of a "commercial" nature. (or perhaps obscene - note footnote 8)[9]

It is a basic right contained in our Constitution not to have this intrusion regardless of status as a student or place of residency - dormitory room or apartment.

> "They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations, they conferred, as against the government, the right to be left alone - the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438 (1928); Brandeis J., dissenting)

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[6]The Court of Appeals indicates that this is an inherent zoning like power (footnote 3) The opinion does not speak to any actual threat or complaint from the students.

[7]One might assume according to the "zoning" analysis utilized by the Court (footnote 3) that the university would also have the right to limit or exclude access to obscene material despite *Stanley v. Georgia*, 394 U.S. 557 (1969)

[8]The court addresses this (footnote 26) where it indicates that analysis must be done to the purpose of the organization for each invited guest under *Bolger v. Youngs Drugs Product Corp.*, 463 U.S. 60, 103 S. Ct. 28, 75-77 L. Ed. 2d 469 (1983)

[9]Note pending case of *AFS v. State U. of N. Y., Cortland*, 565 F. Supp. 754 (1983) presently pending in the Northern District of New York litigating similar issues where the university entered the student's dormitory room without warrant and arrested the AFS representative.

CONCLUSION

The Court of Appeals misconstrued the true focus and the issues of critical importance when it failed to recognize the students First Amendment rights within the privacy of their own home - their dormitory room. SASU and CAS respectfully urge that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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NO. 84-1734

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NO. 84-1734

KATHY JOHNSON,

Petitioner,

vs.

THE PENNSYLVANIA STATE UNIVERSITY, BOARD OF TRUSTEES OF THE PENNSYLVANIA STATE UNIVERSITY, JOHN W. OSWALD, individually and as President of the Pennsylvania State University, M. LEE UPCRAFT, individually and as Director of Residential Life Programs of the Pennsylvania State University,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER KATHY JOHNSON

I. INTRODUCTION AND SUMMARY

This case concerns First Amendment issues of critical social and public importance, the outcome of which is ruled by well established precedents of this Court, fairness and common sense. Application of those precedents, however, has never been fully explored by this Court in the context of the rights of students at state universities to use their dormitory rooms, as others would use their living rooms, for any lawful, non-disruptive purpose. These purposes include the free exercise of their rights to inquire, to speak, to listen, to learn, and to share in peer judgments of friends in a group setting.

The Petitioner and students seeking vindication of their rights in this case represent the vast majority of ordinary young college students who seek nothing more than the right to decide for themselves, without interference from the state, what topics they wish to discuss, and with whom, within the peace and privacy of their own campus living rooms. These young people, during these critical years of their education and training for life, should be assured that the Constitution and the law works as well for them as for some of their more strident contemporaries.

The University's contention that the Court of Appeals' decision is consistent with decisions of this Court is wrong: The holding of *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980) was misapplied. *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983) and *Clark v. Community for Creative Non-Violence,* 104 S.Ct. 3065 (1984) are clearly distinguishable and have nothing to do with the legal issue raised in the instant case.

In addition, the Court of Appeals did not have the benefit of this Court's recent decisions in *Anderson v. City of Bessemer,* 53 U.S.L.W. 4314 (U.S. March 19, 1985) (No. 83-1623); *Zauderer v. Office of Disciplinary Counsel,* 53 U.S.L.W. 4587 (U.S. May 28, 1985) (No. 83-2166); and *Lowe v. SEC,* 45 S.Ct. Bull.P. (CCH) B3431 (U.S. June 10, 1985) (No. 83-1911) which are, we submit, case dispositive in plaintiff's favor for the reasons discussed below.

Because respondents have so distorted the issues by their response to plaintiff's Petition, we wish to reiterate at the outset for the benefit of the Court what this case is all about and what it is not about:

> It is *not about* the right of third parties to gain access to University property or public forums to make uninvited protests, by speech or symbolic acts.
>
> It is *not about* the right of commercial vendors to enter college campuses or dorm rooms without invitation to knock on doors and peddle their wares, in a "rent-free merchandise mart." (*Petition App.* at 28a).

It is *not about* attempts of students to disturb the traditional dormitory setting by operating a showroom or conducting a business out of their rooms.[1]

It is *not even about* the direct rights of any speaker, solicitor of funds, or business invitee—whether lawyer, stockbroker, or seller of Christmas cards or kitchen equipment—to respond to a bona fide invitation to come to a gathering of friends in a private dormitory room.

What it is about—is simply the First Amendment right of students to use their dormitory rooms as others use their private homes or apartments, for any lawful, safe or non-disruptive educational, social, cultural or other purpose, free of government intrusion, censorship or restraint.

Finally, it is about the proper role of appellate courts, and whether they should be rewriting a record and substituting their own factual findings or inferences for those of the District Court, merely because they might have decided them differently. Such practices were severely criticized, requiring reversal and remand by this Court in its recent decision in *Anderson v. City of Bessemer,* above.

II. THE COURT OF APPEALS' DECISION IS NOT LIMITED IN ITS EFFECT

The issues raised by this case, which go beyond the immediate rights of the parties, concern important and core First Amendment rights of free expression, association and choice of all students who reside in dormitories at state universities.

The University's response attempts to gloss over the truly draconian nature of the challenged regulation. The regulation prohibits significantly more than "group sales of cookware in students' rooms." Brief In Response To A Petition For A Writ

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[1] There was no evidence whatsoever to support the "rent-free merchandise mart" concept or to support the notion that any student had abused or would abuse the use of his or her room for commercial purposes. *See Petition* at 20. The student testimony makes clear that the proposed demonstration was a "one shot" occasion.

Of Certiorari ("Response") at 7. This point was cogently made in the Court of Appeals by the Brief of Amicus Curiae American Civil Liberties Foundation of Pennsylvania:

> Indeed, . . . *the solicitation regulations clearly also restrict political expression.* Paragraphs 2 and 3 of the regulations expressly prohibit solicitation of money and sales by any "person (including a student), . . . charitable organization, religious organization or other organization." The regulations thus would prohibit not only commercial speech and transactions, but such activities as sale of political buttons or t-shirts for contributions at a political meeting in a student's dormitory room or charitable or political fund-raising gatherings in the rooms of students who wished to conduct such activities. *Political and charitable solicitation and contributions however, are political speech and association accorded the highest protection under the First Amendment,* not commercial speech, notwithstanding that money is involved. (citations omitted, emphasis supplied)

(*Petition App.* at 189a).

Furthermore, contrary to the University's assertion, the relief sought by the student plaintiffs in this case, including Petitioner, was *not limited* merely to the right to host or participate in a group AFS educational and commercial presentation. They made a broad-based attack on the overbroad, arbitrary and hastily drawn University regulation which prevented *any* sale, solicitation of a sale, or of funds, etc. anywhere within the residence halls, unless it occurred: 1) at the request of the party to be solicited; 2) only in his or her room, 3) and with *no other persons present,* (which included the student's roommate.) (*See Petition App.* at 84a-85a).

The trial judge was emphatic in condemning the absurdity of a regulation which barred any group (but not "one-on-one") gathering in a private room, particularly when he had found that all rules pertaining to safe occupancy and use, etc. were followed. (*Petition App.* at 117a-119a).

III. THE COURT OF APPEALS' DECISION IS NOT CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

As noted above, the University's principal argument in opposition to the petition is: 1) that this is solely a commercial speech case, relying upon *Bolger* and 2) that the commercial speech standards of *Central Hudson*, were applied properly in light of *Clark*. (*Response* at 3-6). For the reasons developed below, the University's argument does not withstand scrutiny.

A. Pure Free Speech Rights Are At Stake In This Case

The rights at issue in this case are not, as argued by the University, solely commercial in nature.[2] Indeed, the University conceded below that the particular demonstration of AFS's goods "does contain much material of an educational nature." (*Petition App.* at 50a). More importantly, the regulation, as pointed out in the *Petition* at 5, 9-10, sweeps far beyond the particular AFS demonstration. The students, including Petitioner, as reinforced by the unchallenged testimony of two highly qualified experts, presented testimony, accepted as genuine by the District Court, that the students' *motivations* for desiring to participate in the challenged activities were not commercial, but rather were social, educational and cultural. (*Petition* at 16; *Petition App.* at 121a-122a).

Analyzing the nature of the speech from the speaker's perspective, as the University does, is wrong. If a listener can possess pure First Amendment rights where the speaker possesses none, *Kleindienst v. Mandel*, 408 U.S. 753, 762-65 (1972),[3] then, *a fortiorari*, a listener can possess *pure* free

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[2] *Cf. Lowe v. SEC* where the concurring Justices noted that it was not necessary in that case to decide whether petitioners' newsletters that were banned by the SEC, contained "fully protected speech or commercial speech." 45 S.Ct.Bull.P. (CCH) B3431, B3485 (U.S. June 10, 1985).

[3] Petitioner is not asking this Court to hold that the nature of the speech is determined by what the recipient is thinking at the particular moment. Rather, when the recipient's rights are at issue, the nature of the speech should be determined by analyzing the listener's motivations underlying his or her desire to participate in the first instance.

speech rights where the speaker possesses only *commercial* speech rights. (*Petition* at 16 n.19). When analyzed from that proper perspective, the speech rights at issue in this case are not commercial but are "fully protected speech" and may be restrained only under "most extraordinary circumstances." [4]

B. The Standards Applicable To Commercial Speech Were Misapplied By The Court Of Appeals and Its Opinion Conflicts With This Court's Decision In *Zauderer* v. *Office of Disciplinary Counsel*

Alternatively, should this Court conclude that only commercial speech rights are at stake in this case, certiorari should be granted to review or to reverse and remand to the Court of Appeals for failure to adhere to the clear strict standards for reviewing commercial speech, set forth in *Central Hudson,* and reaffirmed just last month in *Zauderer v. Office of Disciplinary Counsel,* and in the concurring opinion in *Lowe v. SEC.* As we point out below, these two cases reveal the clear error of the Court of Appeals in this case by its misplaced emphasis on *Clark,* and in wrongly reading into that case, a relaxation of the "least restrictive" test of *Central Hudson.*

The University's argument in its Response that *Central Hudson* was applied properly in light of this Court's decision in *Clark* misreads the distinguishing factors of *Clark.* In the instant case, the First Amendment activity is invited free expression within a private dormitory room. The facts of *Clark,* on the other hand, involved protest through expressive conduct on public property designated for peaceful public purposes.[5] Moreover, the prohibition in *Clark* was not upon the symbolic demonstration, but rather was limited solely to overnight sleeping or camping in the park. *Id.* The favorable result for

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[4] As stated in the concurring opinion filed in *Lowe v. SEC:*

> Such a flat prohibition or prior restraint on speech is, as applied to fully protected speech, presumptively invalid and may be sustained only under the most extraordinary circumstances. (citations omitted)

45 S.Ct.Bull.P. (CCH) at B3485.

[5] The location at issue in *Clark* was one of the national parks described by this Court as "unique resources that the Federal Government holds in trust for the American people." 104 S.Ct. at 3067.

plaintiffs in *Clark* was a reasonable balancing of the government's interest in preserving public parks for reasonable public purposes and still accommodating First Amendment public protest. The prohibition in this case, by contrast, is an outright ban on group speech in a student's home away from home. Furthermore, and unlike the situation present in *Clark*, 104 S.Ct. at 3070, the students do contest vigorously the issue of the availability of reasonable alternative means for participation in the desired First Amendment activity. (*Petition* at 13 n.14).[6] Finally in this case, as in *Clark*, the plaintiff below prevailed, thus giving each the added protection of Fed.R.Civ.P. 52a under *Anderson v. City of Bessemer* discussed in Sec. III, C. below.

Most significantly, this Court recently reaffirmed the *Central Hudson* standards in *Zauderer v. Office of Disciplinary Counsel* (and cf. concurring opinion in *Lowe v. SEC*) thus repudiating the lynch-pin argument of the Court of Appeals below that the "least restrictive test" of *Central Hudson* had been liberalized by this Court's application of that standard in *Clark*.[7] The Court's discussion in *Zauderer* and *Lowe* is entirely consistent with Petitioner's arguments that the regulation failed to advance the proffered state interests and was, as all but conceded by the Court of Appeals, far more extensive than necessary. (*Petition at 18-25* and fn. 11 below).

For example, this Court in *Zauderer* reaffirms and emphasizes that the *least restrictive possible means* must be chosen

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[6] In *Clark*, there were many other reasonable means of protest available to the plaintiffs that served to make the regulation in that case far less arbitrary than the regulation in the instant case. Here, there is no substitute for the kind of interchange and sharing of peer judgments and values which occurs in the students' own dorm rooms. If this activity is stifled in the students' rooms, as it is by this regulation, it simply will not occur elsewhere as the University suggests.

[7] *See Petition App.* at 24a-26a and fn. 11 below.

where an infringement upon speech which is neither unlawful, nor false and deceptive, is at issue. This court stated:

> . . . the burden is on the State . . . to demonstrate that the restriction vindicates the [governmental interest] through *the least restrictive available means.*

53 U.S.L.W. at 4593 (emphasis added)[8]

This court in *Zauderer* also rejected prophylactic draconian restraints, devoid of evidentiary support, designed to remedy the *potential* abuses. Specifically, the Court stated:

> The State's arguments amount to little more than *unsupported assertions*; nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses [at issue] *cannot be combatted by any means short of a blanket ban.*

53 U.S.L.W. at 4593 (emphasis added).[9] Similarly, in *Lowe v. SEC,* above, the concurring Justices, reiterated and reemphasized the strict rules of *Central Hudson* [10] that were applicable

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> [A]lthough we might be able to imagine alternative regulations that accomplish Penn State's objectives *while interfering less with the students' and AFS's rights to communicate,* we will not strike down the University regulation on this ground, (*Petition App.* at 26a) (emphasis added).

[9] Compare the statement in *Zauderer,* quoted in the text above, with the statement by the Court of Appeals in the instant case that

> [I]t is not unreasonable to *conclude* that the character of the Penn State dormitories would be adversely affected in the absence of restrictions on commercial solicitation. The University's restriction, *therefore,* directly advances it purpose. (*Petition App.* at 24a) (footnote omitted and emphasis added).

See Petition at 21 n.22.

[10] *See* Section 11, 45 S.Ct.Bull.P) at B3485-3486: "But even where mere 'commercial speech' is concerned, the First Amendment permits restraints on speech only when they are *narrowly tailored* to advance a legitimate governmental interest. . . . Our commercial speech cases have consistently rejected the proposition that such drastic prohibitions on speech may be justified by a *mere possibility* that the prohibited speech will be fraudulent." (citations omitted, emphasis supplied).

to commercial speech. Thus, this Court's holding and discussion in *Zauderer* and *Lowe* demonstrate clearly that the Court of Appeals in the instant case erred in its reliance upon *Clark* due to dilute the standards set forth in *Central Hudson.*

C. The Court Of Appeals' Opinion Ignored Rule 52(a) And Conflicts With This Court's Recent Decision in *Anderson v. City of Bessemer*

In addition, the University completely disregarded the factual findings of the District Court in this case and failed to address the Rule 52(a) issue which was raised by Petitioner (*Petition* at 22, fn. 26) and recently reemphasized in *Anderson v. City of Bessemer.* The instant case is all the more egregious, considering that the Court of Appeals had specifically remanded in *AFS II,* 688 F.2d 907 (*Petition App.* at 44a-60a) for the express purpose of developing a record and making findings on the (a) credibility or reasonableness of the University's claimed justifications for the infringement of the students' rights and (b) whether such regulation served to advance those justifications. The District Court, after three days of testimony, full briefs and oral argument, rendered extensive factual findings adverse to the University, which were ignored and reversed by the Court of Appeals in its opinion in AFS III, the opinion this Petition seeks to have reviewed.

The District Court, in the exercise of its sound discretion, rejected the testimony of the University's witness on how the regulations furthered its "flood gate" argument and sought to preserve a quiet study atmosphere. The District Court found that these contentions were "unconvincing", "illogical", "absurd", "contrived", "imagined", "not valid", "not persuasive in light of evidence" and not serving "any legitimate governmental interest". (*Petition App.* at 117a-119a). Moreover, the District Court judge noted that he was impressed with the sincerity of the students, and concluded that their testimony relating to their educational, social, cultural and other noncommercial reasons for participating in the prohibited activities was genuine and valid. (*Id.* at 122a).

The panel opinion of the Court of Appeals completely ignores these factual fundings rendered by the court below. To

the contrary, its opinion, without even addressing the Rule 52(a) issue simply substitutes its own view of the validity of the claimed governmental interests for that of the District Court's, without a single reference to any record evidence supporting its conclusion, nor any suggestion that the lower court's findings on this point were clearly erroneous. This is precisely what this Court criticized and reversed the Court of Appeals for doing in *Anderson v. City of Bessemer.* Thus, the Court of Appeals' action in this case squarely contradicts this Court's holding in *Anderson v. City of Bessemer* that Rule 52(a) must be followed by the Appellate Court.[11]

IV. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[11] Thus, at the very least, petitioner requests this Court to grant certiorari for the purpose of summarily reversing and remanding the matter to the Court of Appeals for reconsideration in light of the recent *Anderson v. City of Bessemer* and *Zauderer v. Office of Disciplinary Counsel* decisions which were unavailable to the Court of Appeals at the time of its decision.